THE ACTIVE VICES

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Alexander Bickel's pathbreaking idea of the "passive virtues" attempted to explain and justify the Supreme Court's power to control its docket. He proposed that the Court's extensive discretion allows it to remain passive and avoid politically perilous cases, preserving its institutional legitimacy until such time as durable principles are at stake. This theory remains one of the most influential ideas in legal scholarship, but it is dangerously incomplete. Discretion is a double-edged sword, empowering the Court not only to avoid politics, but also to engage in it. In other words, a policy-motivated Court can use its agenda-setting power to target highly politicized questions rather than to avoid them. This brings the Court into politics rather than keep it out.

This Article breaks new ground by showing how the same power that allows the passive virtues also permits the "active vices." Building on recent scholarship on the Court's targeting of specific questions for review, the Article explores the empirical and theoretical consequences of the active vices. At the heart of the empirical analyses are two new datasets that permit the first ever statistical analysis of the Court's shadow docket and the first test of its question-targeting activities on the merits. Specifically, the data strongly suggest the Court's agenda-setting practices make the Justices seem more polarized on the merits than they are on the shadow docket and that question selection increases politicization and divisiveness. The active vices also have important theoretical implications for critical issues confronting American democracy, such as judicial review and congressional gridlock.

INTRODUCTION

Scholars defending the Supreme Court's power to set its own agenda inevitably return to Alexander Bickel's famous "passive virtues."[1] The central idea of the passive virtues is that the Court can use agenda control to avoid issues that would draw the Court into politics and undermine its legitimacy.[2] Such defenses, however, always overlook the simple truth that the Court does

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1. *See, e.g.*, Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961) [hereinafter *Passive Virtues*]. Of course, those virtues have often come into question in theory and as applied. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 1 (1964). A famous example is the Court's decision to ignore the appeal in *Naim v. Naim*, 350 U.S. 891, 891 (1955), which challenged Virginia's anti-miscegenation statute. Justice Frankfurter argued that the Court should not resolve *Naim* in the wake of deciding *Brown* as it would risk the Court's prestige. *See* Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L.J. 1423, 1476 & n.317 (1994) (quoting a Nov. 4, 1955 memorandum from Justice Frankfurter); *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954). Commentators have justly condemned this decision as "wholly without basis in the law" and "absurd." *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 72 (2000).

2. *See Passive Virtues*, *supra* note 1, at 43.

not actually choose cases; it picks its questions.[3] It often does so to answer questions that polarize the electorate.[4] Rather than exercise agenda control to refrain from politics, the Court often uses those powers to jump in. The passive virtues become the active vices.

The central idea of this Article is that the Court uses its agenda-setting powers differently than Bickel and later scholars recognize. Certiorari discretion today exceeds Bickel's dreams—or nightmares.[5] The Court uses certiorari to pick its questions, not its cases. In theory, this should give the Court additional means of reaping the benefits of the passive virtues. The Court can decide important cases while avoiding divisive questions or testing the political winds before reaching a final decision in a later case.[6] In practice, however, the Court has not always taken Bickel's advice when exercising this power. Instead, it consistently uses its agenda-setting powers to engage, rather than avoid, politically divisive issues. Indeed, the Court uses its question-selection power seemingly to target the most politicized issues and to "establish our national priorities in constitutional and legal matters."[7] This task is anything but passive, and it poses an obvious challenge to the democratic values that concerned Bickel.

Unsurprisingly, if the passive virtues provide protection from political conflict by avoiding political issues, the active vices invite it by seeking these questions out. Consider one of the Court's most politicized and divisive opinions, *Citizens United v. Federal Election Commission*.[8] This high-profile political landmine seemed like an ideal moment for the Court to exercise the passive virtues. Rather than pick sides in a contentious political battle and strike down an Act of Congress with broad bipartisan support, the Court could have simply let the case pass without review, or at least decided the case on other grounds, so as to avoid the constitutional question. The Court, however, did something else entirely.

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3. Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 794–95 (2022).

4. A short list of such cases includes: Furman v. Georgia, 408 U.S. 238 (1972) (death penalty); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (abortion); Hollingsworth v. Perry, 570 U.S. 693 (2013) (marriage equality); United States v. Windsor, 570 U.S. 744 (2013) (same); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (class actions); NLRB v. Canning, 573 U.S. 513 (2014) (appointments clause); M.B.Z. *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189 (2012) (recognition of Jerusalem); and United States v. Texas, 578 U.S. 917 (2016) (DAPA program).

5. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 717 (2012) ("[T]he discretion now exercised by the Court may be even more open-ended than Bickel's . . . .").

6. *Compare* Dunn v. Ray, 139 S. Ct. 661, 661 (2019), *with* Murphy v. Collier, 139 S. Ct. 1475 (2019). The Court lifted the stay of execution in *Dunn*. After a public outcry, the Court granted a stay in *Murphy* under nearly identical circumstances.

7. Warren E. Burger & Earl Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 721, 728 (1973).

8. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

At the opening of the majority opinion, Justice Kennedy asserts, "[i]n this case we are asked to reconsider" two precedents upholding limits on electioneering communications.[9] But who, exactly, asked the Court to reconsider those precedents? Citizens United did not; indeed, they had previously waived the constitutional questions.[10] It was the Justices who asked themselves the question.[11] The majority opinion is less a legal document than a Socratic dialogue where the Court asks and answers its own question. That decision raised a firestorm of controversy and threw the Court into the deep end of national politics.[12] President Obama's public chastisement of the Justices in his State of the Union and Justice Alito's visible response put the politicization of the Court on prominent display.[13] The contentious political fallout that followed the decision was a direct result of the Court's unilateral decision to inject its own question into the case.

It is doubtful that Bickel ever anticipated the Court using its discretion in this way. The passive virtues were his attempt to explain and justify the Court's expansive agenda control powers.[14] That explanation and justification hinged on an assumption about what the Justices wanted and what the Court would do with those powers. Bickel assumed the Justices wanted to protect the Court from politics until the necessity of defending durable principles overcame the institutional risks of engaging in politics.[15] Put differently, Bickel's assumption was that the Court's discretion would always be used benignly.

Bickel did not appreciate, nor have his heirs appreciated, that discretion can be put to malign purposes as well. If Justices are interested in making policy or vindicating the interests of their political coalition, they will be less interested in avoiding political cases. Indeed, they may seek them out. The Court's activism in *Citizens United* is entirely outside of Bickel's imagination.

That discretion may be abused is not to say that it will or must be. Still, if we are to fairly evaluate Bickel's theory, we must be aware that one cannot have the passive virtues without the risk of the active vices. The possibility cannot be wished away or ignored. If it turns out that the Court does use discretion in a way that contradicts the passive virtues, or if there are overlooked dangers

9. *Id.* at 319.

10. *See* Monaghan, *supra* note 5, at 690. Citizens United waived facial constitutional claims earlier in the litigation. To see the questions they did present, see SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/qp/08-00205qp.pdf (last visited Aug. 22, 2022).

11. *See* SUPREME COURT OF THE UNITED STATES, *supra* note 10 ("The parties are directed to file supplemental briefs addressing the following question: For the proper disposition of this case, should the court overrule either or both Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), and the part of McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003), which addresses the facial validity of section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?" (alteration in original)).

12. *See* Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), https://www.nytimes.com/2010/01/29/us/politics/29scotus.html.

13. *Id.*

14. *See Passive Virtues*, *supra* note 1, at 47–50.

15. *See id.*

lurking within the virtues themselves, those are both reasons to revisit the scope of the Court's discretion. There is, after all, little reason to give the Court discretion to avoid politics if it is going to use that power to dive in instead. Similarly, if that discretion exacerbates congressional gridlock and undermines judicial review, it may be time to rethink the Court's agenda-setting powers.

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This Article makes three contributions. First, it introduces the concept of the active vices, the counterpoint to Bickel's passive virtues. The Court has the power to pursue either virtue or vice through its vast power to construct its docket in a way to avoid or to engage in politicized issues. In fact, the Court often does both. For example, contrast the Court's agenda-setting decisions in *Cameron v. EMW Women's Surgical Center, P.S.C.* with those in *Dobbs v. Jackson Women's Health Organization*.[16] Both cases teed up contentious questions related to the Court's abortion jurisprudence. In *Cameron*, the Court sidestepped the politicized issue and took a question on a technical issue of standing.[17] In *Dobbs*, the Court set aside questions that would allow the Justices to avoid reconsidering its entire abortion case law and limited review to a direct reconsideration of *Roe* and *Casey*.[18] Whatever one's views on abortion as a legal or policy matter, it is indisputable that the former was an exercise of the passive virtues and the latter of the active vices.

The second contribution is an empirical study of how the Court uses this power. Drawing on an original dataset of orders granting certiorari and established measures from peer-reviewed studies of the Court, the empirical results come in two parts. The first involves the first ever statistical study of ideology on the shadow docket. The analysis suggests that the Court's agenda control practices make the Court appear roughly twice as polarized on merits cases than they are on the shadow docket. This study has immediate implications for the growing view among Justices that they should apply certiorari criteria to the shadow docket: doing so may make that docket appear even more politicized than it is.

The second piece of the empirical analysis explores question selection directly. It finds that when the Court targets specific questions—by adding or subtracting them from the certiorari petition—the case is more politicized and divisive. Specifically, when the Court aggressively intervenes to select questions, the Court draws more attention from political interest groups (measured by the

16. *Compare* Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1009 (2022) (addressing technical standing issue instead of abortion's constitutionality), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022) (reviewing prior abortion decisions rather than all of abortion law).

17. *See Cameron*, 142 S. Ct. at 1009.

18. *See Dobbs*, 142 S. Ct. at 2244; *see also* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

number of amicus briefs filed) and significantly increases the probability of a 5–4 decision.[19] Further exploration suggests that these effects are particularly concentrated in cases where the Court adds constitutional questions to cases, as in *Citizens United*.[20] Importantly, these effects remain after adding key controls, suggesting the effects are not simply the result of the Court targeting questions in particularly divisive cases.

The third contribution is an initial exploration of the theoretical implications of the active vices. Not only does question selection appear to politicize the Court, but it also has a host of unrecognized implications for issues of first-order importance such as judicial review and congressional gridlock.

The Article is organized as follows: Part I describes the traditional passive virtues and introduces the other side of the coin: the active vices. The active vices are especially likely to infect the Court when it focuses on questions instead of cases. Despite limiting certiorari review to questions—instead of full cases—since at least the 1930s, the academic literature has been virtually silent on the implications of this practice. Part II considers three alternative hypotheses about the effects of question selection. It uses history and empirics to ascertain whether the Court's practice of targeting questions implements the passive virtues (reduces politicization and division), exercises the active vices (increasing these), or if the practice is immaterial. Part III explores the theoretical implications of the active vices. The Article concludes with a proposal for the Court to stop targeting questions.

I. PASSIVE VIRTUES AND ACTIVE VICES

Bickel's passive virtues theory was a powerful mix of descriptive, normative, and prescriptive scholarship. The core descriptive idea was that the Court uses its agenda control and jurisdictional doctrines to avoid institutionally damaging political issues.[21] Normatively, the claim was that the Court was right to do so. Prescriptively, the Court should continue the practice.

Central to his theory was the Court's agenda control through the writ of certiorari, a discretionary tool that would give the Court freedom to dodge the

19. Another instance of the active vices would be the more familiar aggressive use of justiciability doctrine to reach policy questions. While this alternative vice is not part of my study, it is the subject of much existing scholarship. *See, e.g.*, Heather Elliott, *Does the Supreme Court Ignore Standing Problems to Reach the Merits? Evidence (or Lack Thereof) from the Roberts Court*, 23 WM. & MARY BILL RTS. J. 189, 189 (2014); Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 300 (2015); Monaghan, *supra* note 5, at 714; *see also* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 595 (2010); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1316 (1995); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 380 (1988).

20. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010).

21. *See Passive Virtues*, *supra* note 1, at 47–50.

cases it needed to.[22] By avoiding problematic cases, the Court would keep its powder dry for times that "durable principle[s]"[23] were at stake. In those instances, the Court would have the political capital to spend on protecting rights because it would not have squandered it on less important, divisive cases. The passive virtues, Bickel promised us, would protect the Court's legitimacy.

What this legitimacy is, what it does, and how it should be measured are topics of endless interest to legal scholars and political scientists that are outside the scope of this Article. What is relevant here is the growing conviction that the Court's legitimacy is of fundamental importance and under attack. This raises the question of why this is happening, especially if the Court has the passive virtues at hand to protect itself.

Discretion, however, is a sword with two edges. If the Justices want to get out of politics, discretionary agenda control gives them the means; however, if the Justices want to get into politics and get their hands dirty making policy, discretion allows them to do that also. This possibility seems obvious upon reflection, but it has been largely overlooked in scholarship to this point. This Part places the traditional virtues side-by-side with the other side of that coin: the active vices.

A. Passive Virtues

Bickel suggested the passive virtues as a practical solution to two deep problems. The first and most famous concern was the counter-majoritarian difficulty.[24] Here, Bickel identified both the need for a counter-majoritarian Court to exercise judicial review and the incompatibility of such a Court with democracy. Second, Bickel was concerned with the Court legitimating bad but constitutional laws.[25] He acknowledged that, as a formal matter, a judgment that a law was constitutional was not an endorsement of the wisdom of that law, but Bickel recognized that the political consequences of legal validation often defied such a nice distinction. Opponents of validated policies would turn on the Court, and if unwise policies led to bad outcomes, the Court would be politically accountable. The Court, Bickel recognized, was in a bind. In politically contentious cases, no matter how the Court decides the case, its legitimacy is at risk. For Bickel, then, when faced with the deep "tension between principle and expediency,"[26] "the only winning move is not to play."[27]

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22. *See id.* at 46.

23. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 127–33, 168 (1962).

24. *Id.* at 16–23.

25. *Passive Virtues*, *supra* note 1, at 48–50.

26. *Id.* at 50.

27. *Cf.* Movieclips, *WarGames (11/11) Movie CLIP – The Only Winning Move (1983) HD*, YOUTUBE (July 30, 2013), https://www.youtube.com/watch?v=MpmGXeAtWUw&t=98s.

To survive, the Court must be able to dodge such cases. It then follows that the Court must have the power—and possibly the duty—to avoid jurisdiction altogether. To this end, Bickel urged the Court to use the range of its justiciability doctrines to avoid the twin dangers of legitimating bad, constitutional laws and raising democratic hackles by striking down popular but unconstitutional statutes. In addition to traditional justiciability concerns, such as ripeness[28] and the political question doctrine,[29] Bickel thought certiorari was a particularly useful tool that, along with flexible justiciability decisions, would permit the Court to "abstain from intervention in the political process."[30] This is not to say that the Court was not, should not be, or could even avoid being political. Indeed, Bickel understood the decision to "stay[] out of politics" to be deeply political.[31] By this, he meant that the decision to grant or deny certiorari was not "principled in the sense in which we have a right to expect adjudications on the merits to be principled," but rather one of prudence.[32] The prudential concerns were, however, politically inflected. In Bickel's words, "[t]hey mark the point at which the Court gives the electoral institutions their head and itself stays out of politics . . . ."[33]

Bickel's account of the extent of the Court's flexibility continues to draw outrage from scholars that it "amount[s] to a claim that the Court [can] act lawlessly . . . ."[34] The lawlessness that drew the complaint was not the arbitrary application of certiorari discretion. It was, instead, the Court's practice of treating its mandatory jurisdiction as discretionary.

Though the Judges Bill in 1925 gave the Court expansive discretion over much of its docket, there were still large sets of cases that fell within the Court's mandatory jurisdiction.[35] Congress would continue to expand the domain of certiorari throughout the twentieth century,[36] culminating in the Supreme Court Case Selections Act of 1988,[37] which eliminated nearly all of the remaining

28. *See* BICKEL, *supra* note 23, at 143–56.

29. *Id.* at 183–97.

30. *Id.* at 139.

31. *Passive Virtues*, *supra* note 1, at 51.

32. *Id.*

33. *Id.*

34. Monaghan, *supra* note 5, at 714; *see also* Gunther, *supra* note 1, at 13 (decrying Bickel's guidance on justiciability questions as "not merely bad but lawless judgment").

35. The Judges' Bill limited mandatory review of state decisions to cases where the state court (1) upheld a state statute or authority against a challenge based on constitutional or federal law; or (2) struck down a federal statute, treaty, or authority as unconstitutional. In federal cases, the Court still had to take cases in which the court of appeals struck down a state statute and few other specified types of cases straight from the district courts. The remainder of the docket was made discretionary. *See* Judiciary Act of 1925, 43 Stat. 936, 937–38.

36. *See generally* Mark Tushnet, *The Mandatory Jurisdiction of the Supreme Court – Some Recent Developments*, 46 U. CIN. L. REV. 347 (1977).

37. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

mandatory jurisdiction.[38] But when Bickel was outlining the passive virtues, the Court had a statutory obligation to decide cases that, for example, emerged from state courts that had ruled against an individual's constitutional claim.

A famous example was *Naim v. Naim*,[39] which challenged the same Virginia ban on interracial marriage that was later struck down by *Loving v. Virginia*.[40] The Court was deeply concerned about the effect of any ruling.[41] On the one hand, Justices worried that if the Court took the case it would "surely seem to be governed by the principle of the *Segregation Cases* . . . ."[42] If the Court struck down the statute, it would put the Court's efforts to desegregate schools at risk.[43] But if it upheld the statute, it would legitimate the odious statute and undermine the rationale of its burgeoning Civil Rights jurisprudence.

The Court dodged this case twice. First, it claimed the case had an insufficient record.[44] The Virginia Supreme Court of Appeals simply reinstated its decision and made clear that the record was more than sufficient.[45] The Court then ducked the case a second time as "devoid of a properly presented federal question."[46] This transparent avoidance in the face of its clear legal obligation drew contempt from commenters at the time and throughout the years.[47] But for Bickel, this was the correct decision since it protected desegregation gains and protected the Court's legitimacy.[48]

The scholarly anger at the Court's "lawless" jurisdictional practices that crested in the 1970s was primarily aimed at the way the Court routinely ignored the mandatory nature of its mandatory jurisdiction.[49] The Court's practice of treating mandatory jurisdiction as discretionary was, however, well-known to—and in fact celebrated by—Bickel in the early 1960s.[50] Bickel was something of an outlier in his comfort with this practice.

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38. The Court's remaining mandatory jurisdiction is limited to cases from three-judge panels. *See* 28 U.S.C. § 1253.

39. Naim v. Naim, 87 S.E.2d 749, 750, 754–56 (Va. 1955) (rejecting the plaintiffs' challenge to Virginia's ban on interracial marriage), *vacated and remanded*, 350 U.S. 891 (1955) (per curiam).

40. Loving v. Virginia, 388 U.S. 1 (1967).

41. *See, e.g.*, Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2257–58 (2019) (book review).

42. BICKEL, *supra* note 23, at 71.

43. Memorandum of Mr. Justice Frankfurter on *Naim v. Naim* (November 4, 1955), *in* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 95–96 (1979).

44. 350 U.S. 891, 891 (1955) (per curiam).

45. 90 S.E.2d 849, 850 (Va. 1956) (per curiam).

46. 350 U.S. 985, 985 (1956) (per curiam).

47. *E.g.* Wechsler, *supra* note 1, at 34; Mary Anne Case, Lecture, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1790 (2005); Mark Tushnet, *The Warren Court as History: An Interpretation*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 1, 5 (Mark Tushnet ed., 1993).

48. *See* BICKEL, *supra* note 23, at 126.

49. *See, e.g,* Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1061 (1977) ("It is simply inadmissible that the highest court of law should be lawless in relation to its own jurisdiction.").

50. *See* BICKEL, *supra* note 23, at 126.

B. Active Vices

The passive virtues are made possible by the Court's discretion, especially over its docket. One surprising oversight in Bickel's analysis is the full set of alternatives to the passive virtues that are also made possible by this discretion. For Bickel, there seemed to be only two options: either the Court would use its discretion to dodge political entanglements, or it would not make use of its discretion at all. The alternative to the passive virtues was simply to take and decide all of the cases. There is another possibility, though—the Court could use its discretion to engage in politics.

Bickel was surprisingly silent about this possibility. In both his *Harvard Law Review* Foreword and in *The Least Dangerous Branch*, Bickel called the Court to task for jumping into *Times Film Corp. v. City of Chicago*.[51] The case pushed the Court to deal with prior restraint in the context of movie licenses for public viewing. The Court ended up splitting—Bickel notes—5–4 on the merits. Bickel's primary objection was that the Court allowed the parties to push them into a decision on an important topic without sufficient information.[52] That is, Bickel's concern seemed to be that the Court was too passive in relation to the parties, but not passive enough vis-à-vis its docket control. There is little evidence that he ever considered the Court would proactively seek out political engagements.

In the decades after Bickel wrote, however, it has become clear that the Court routinely uses its discretion to engage politically. In her foundational empirical study of certiorari, Professor Provine put it succinctly: "[B]ecause of its broad discretion to set its own agenda, the Court is no longer the passive institution 'with neither force nor will but merely judgment' described by Hamilton . . . ."[53] The quantitative findings support Chief Justice Warren's description of the Court and its question-selection power in quite active language. "The Court's certiorari jurisdiction, and particularly the part that permits the Court to select and reject the issues submitted to it for decision, was designed," he explained, "to permit the Court not only to achieve control of its docket but also to establish our national priorities in constitutional and legal matters."[54]

Recently, legal scholars have examined several different tools the Court has deployed to target questions that could—and possibly should—have been easily avoided. Professor Monaghan catalogued many such devices and gives plentiful

51. Times Film Corp v. City of Chi., 365 U.S. 43 (1961).

52. *Passive Virtues*, *supra* note 1, at 55–58.

53. DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 2 (1980) (quoting THE FEDERALIST, no. 78, at 465 (Alexander Hamilton) (New Am. Libr. ed. 1961)); s*ee also* RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION 15 (1991); Benjamin Johnson, *The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law*, 50 CONN. L. REV. 581 (2018).

54. Burger & Warren, *supra* note 7, at 728.

examples of cases where the Court creatively exercised its agenda-control discretion to reach issues that interested the Court.[55] For instance, the Court will often appoint counsel in support of a judgment below, even if the prevailing party has conceded the decision was wrong.[56] Similarly, the Court will soften, in practice, the statutory requirement that review of state court litigation is limited to final judgments,[57] or it will selectively apply its forfeiture rules to manipulate its access to questions.[58] When it exercises its discretion to grab hold of politically relevant questions, the Court inverts the passive virtues and becomes active.

Just as there is an inversion from passive to active, so too is there the possibility of the virtues falling into vice. If the passive virtues resulted from using discretion to avoid politicized questions that threaten judicial legitimacy, the active vices are a consequence of using discretion to engage with just such dangerous issues. By using its discretionary control over its docket to focus on more political issues, the Court risks participating in exactly the type of political confrontation that imperils the Court.

Importantly, not all acts are active or passive. Bickel is correct that there is a natural, neutral course that the Court could pursue: take and decide all cases in its jurisdiction according to ordinary legal principles. When the Court deviates from those principles (e.g., dodges cases in its jurisdiction, or grabs cases or issues outside of its jurisdiction), it is acting either passively or actively. Once there is action, the ends establish the valence. If the Court acts to avoid an issue that could impose political costs, the action is passive even though, as in *Naim* or *Marbury*, the Court must contort itself to achieve the purposed end. On the other hand, if the Court takes affirmative steps to reach out and grab hold of an issue that will implicate the Court in politics, that would be active. If the Court resurrects a minor, forfeited claim to dispose of a case that might otherwise impose political costs on the Court, that would be an exercise of the passive virtues. Yet in *Citizens United*, the Court resurrected the forfeited constitutional claim so it could engage in a significant policy issue.[59] That was active.

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55. Monaghan, *supra* note 5, at 685.

56. *Id.* at 691–92. Monaghan provides several recent examples. First, in *Greenlaw v. United States*, 554 U.S. 237 (2008), the Government conceded the Eighth Circuit was wrong to increase the offender's sentence *sua sponte* and urged the Court to remand. Obviously, the offender agreed that the increased sentence was in error. The Court appointed counsel to defend the Eighth Circuit's judgment. *See also* Bond v. United States, 564 U.S. 211 (2011); Tapia v. United States, 564 U.S. 319 (2011); Pepper v. United States, 562 U.S. 476 (2011). *Pepper* is particularly interesting since the Court appointed counsel for both the petitioner and for the judgment below.

57. 28 U.S.C. § 1257 (review of state court judgments). *See generally* Monaghan, *supra* note 5, at 687–88.

58. *See* Monaghan, *supra* note 5, at 693–97.

59. Citizens United v. Fed. Election Comm'n, 588 U.S. 310, 330 (2010).

C. An Empirical Question: Searching for Answers on the Shadow Docket

As the last Part demonstrated, the Court can use the same tactics to passively avoid politics or to dive into it. Once the Court starts choosing which cases to decide, it has the power to become more or less engaged in politics. So, how does the Court use its power? This Part offers an initial empirical test and suggests that the Court appears to exercise more active vices than passive virtues.

To see this, first consider how one would ideally answer this question. In a perfect world, a researcher would be able to identify the set of politically charged and politically neutral petitions presented to the Court and see whether the Court took a disproportionate share of political cases.

Unfortunately, this task is effectively impossible. First, the set of cases the Court could take is too large to fully explore. Second, since the same case could potentially be decided on political or apolitical grounds, many cases would defy easy categorization.

Since the perfect is unavailable, this Part looks for a second-best solution. The data that are readily available come from those cases the Court chose to decide. The challenge this presents is that the cases it rejects are hidden from view, making it impossible to see whether the Court is taking a disproportionately political set of cases.

Since it is impossible to compare cases the Court rejects to cases it accepts, this Part compares two separate dockets. Specifically, it compares the cases the Court chooses to decide—using certiorari—and the cases it decides through the applications docket, or what is commonly referred to as the shadow docket.

The tests below compare Justices' behavior on the shadow docket with their behavior on the merits docket. The comparison relies on a few essential assumptions. The first is that polarization on the Court is a reasonable proxy for politicization. That is, if one were to collect Justices into liberal and conservative blocs, the further apart those blocs, the greater the political valence of the docket. The idea here is that Justices make individual decisions on the shadow docket and decisions on the merits docket. If the merits decisions reveal smaller cleavages between ideological blocs than on the merits, it would suggest that the Court is less divided on the merits than on the shadow docket. The second assumption is that the set of cases from the shadow docket included in the tests below are at least as polarizing—which again is a proxy for politicized—as the cases the Court could take on the merits.

Neither of these first two assumptions are terribly taxing. As to the first, a common refrain from scholars and pundits is that frequent liberal–conservative, and now Republican-appointee contra Democratic-appointee, divides on the Court are strong evidence of a politicized—indeed partisan—Court. As to the second, the major differences between the applications docket and the certiorari docket is that the latter set is made up almost entirely of final

judgments by lower courts while the former involves more preliminary motions for emergency relief. Further, the applications docket will be made up almost entirely of federal cases whereas the set of possible certiorari cases will include many state cases. Of these, many will be straightforward criminal cases that should not be terribly divisive.

Finally, and importantly, the only shadow docket cases investigated are those where one or more Justices signed a statement expressing a view in the matter. Thus, the tests below look at only those applications that drew individualized attention from one or more Justices. These cases are presumably more "interesting" than other cases on the shadow docket, but more importantly, since choosing to sign a statement on the shadow docket is a rare and Justice-specific act, one would expect these statements to be very idiosyncratic and highlight whatever extremities exist across the personnel on the Court. That is, if anything, we would expect Justices to be more polarized on the set of shadow docket statements under review than in the ordinary case petitioned for review through certiorari.

To make things more concrete, it helps to describe the data used in the test. The period under study includes the 2018–2019 terms. This is the last natural court that included Justice Ginsburg. Data are drawn from two sources. The merits votes come from the Supreme Court Database. For the 2018–2019 terms, the models use votes from seventy-five non-unanimous cases.[60]

Data from the shadow docket comes from the Supreme Court Journals for those two terms. Since we do not observe the actual votes on the shadow docket, a research assistant went through the journals and identified every instance where a Justice signed a statement involving an application. Every Justice who signed the statement was coded as "voting" for that statement and those who did not sign were coded as a "vote" against it. There were 56 such statements.

Given these two sets of votes, the statistical analysis that follows is straightforward, well-studied, and commonly used in both law and political science to understand the Supreme Court. Step one is to determine the dimensionality of the data. Analysis suggests that both sets of votes fit on a single left–right dimension.[61]

60. For reasons dealing with statistical estimation processes, unanimous cases provide no information, so they are traditionally left out of such models.

61. For guidance on how to recover the dimensionality, see In Song Kim et al., *Estimating Spatial Preferences from Votes and Text*, 26 POL. ANALYSIS 210 (2018). We start by recovering the singular value decomposition of the double-centered correlation matrix and recover the eigenvalues. We then shuffle the vote matrix and repeat this process 1000 times, collecting the eigenvalues each time. We then compare the true eigenvalues recovered in the initial run to the random distribution of eigenvalues produced by the shuffling procedure. Only the first eigenvalue is larger than the median random value, so we conclude that voting on the shadow docket is one-dimensional. We repeat the process for the merits votes from the 2018 and 2019 terms and again find only one dimension of note.

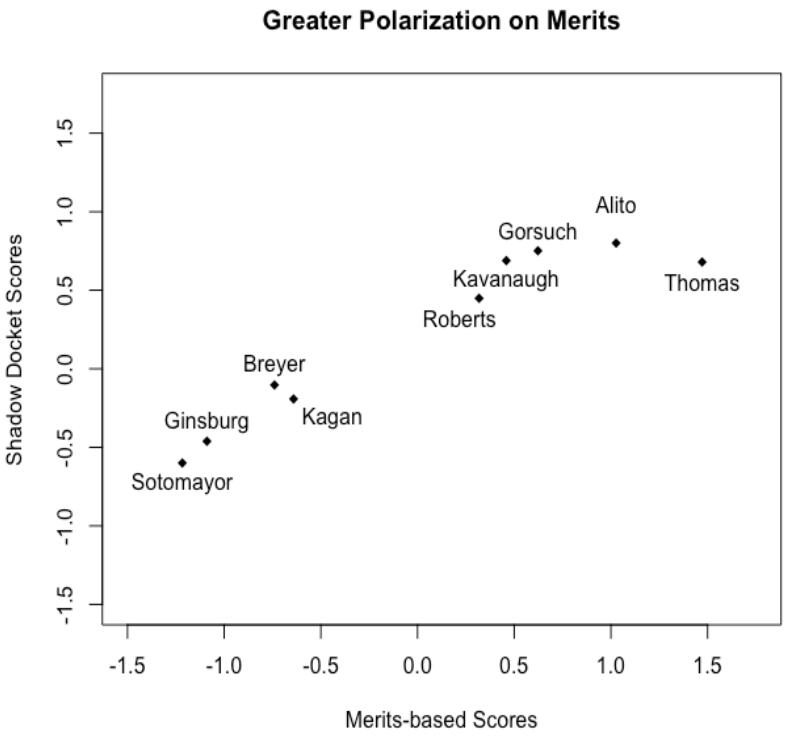
It is then easy to fit a standard "scaling" model. The model used is called the two-parameter IRT model. Such models were developed initially to generate scores from standardized tests like the SAT. The idea is that many individuals take the same test. From this, researchers can first learn which questions are easier or harder based largely on what proportion of test takers got the question correct. This information is captured in the *difficulty parameter*. The model also identifies which questions are good at discriminating between individuals who are rather similar. For instance, researchers can identify which questions do a good job of separating students who get a 1200 and those who score a 1220 on the SAT. A question's ability to parse finely is captured in the *discrimination parameter*. The model not only estimates these two parameters, but it also simultaneously estimates the test taker's ability based solely on the responses to the questions. Thus, the model jointly identifies information about the test and the test takers.

The same models have been used throughout law and political science to study institutions like the Supreme Court. Instead of standardized tests, researchers use votes (e.g., to reverse or affirm a decision below) or in the case of Congress, a vote in favor of or against a bill. Instead of returning an SAT score, the model estimated on these votes returns what scholars have consistently identified as ideology. That is, we can put numbers to how conservative or liberal Justices are. Indeed, perhaps the most famous usage of the model in social science remains Martin and Quinn's famous study of the Court from which they continue to update the Justices' "scores."[62]

The challenge here, though, is that there are two different sets of votes: two different tests, if you will. To see whether or not the Justices are exercising the passive virtues, we must be able to compare the Justices' scores when the model is estimated on the merits against the scores when estimated on the shadow docket. The challenge can be understood like this: It makes a certain amount of sense to compare SAT and ACT scores, but the MCAT and the CPA exam test entirely different things. So, the same test takers would get very different scores on the latter pair even if they looked very similar on the SAT versus the ACT.

Happily, the ideal points recovered correlate at .95. This strongly suggests that the two dockets are scoring the same underlying quality. Indeed, as seen in the figure below, the traditional conservative-liberal dimension seems to describe both very well. With the exception of Justice Thomas, who seems exceptionally extreme on the merits but like a typical conservative on the shadow docket, the points nearly make a clean line.

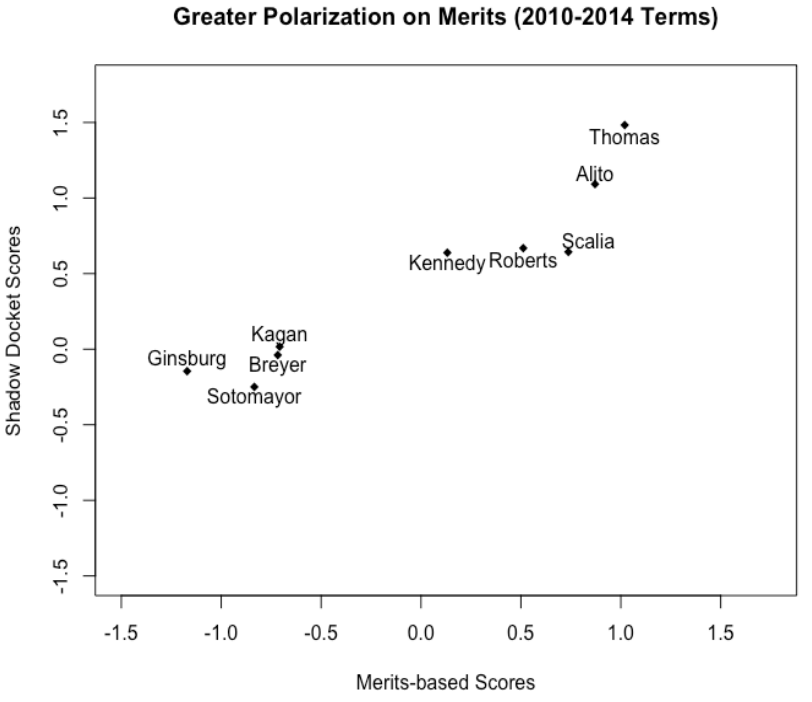
62. Univ. of Mich.: Coll. of Literature, Sci., and the Arts, *Martin-Quinn Scores*, UNIV. OF MICH.: COLL. OF LITERATURE, SCI., AND THE ARTS, https://mqscores.lsa.umich.edu/ (last visited Aug. 22, 2022).



The key observation in the figure, however, is the relative distance between the two blocs. On both the shadow docket and the merits, Chief Justice Roberts is the most centrist of the conservatives. Among the liberals, Justice Breyer is slightly more moderate on the shadow docket than Justice Kagan, who is slightly more to the center on the merits. Whichever comparison one chooses, the gap between Chief Justice Roberts and the liberals is significantly larger on the merits than on the shadow docket. The gap between Chief Justice Roberts and Justice Kagan on the merits is 50% larger than the gap on the shadow docket. The distance between Chief Justice Roberts and Justice Breyer is 92% larger on the merits as compared to the shadow docket. This is strong evidence of relatively more polarization on the merits docket than on the shadow docket.

The 2018–2019 terms were selected because they covered the most recent natural court for which there were sufficient votes on the shadow docket to run the analysis. However, one may be concerned that these two years are merely outliers. As a robustness check, the figure below shows the same test for the 2010–2014 terms. Once again, the gap between left and right coalitions is markedly larger on the merits as compared to the shadow docket. Once again, the gap between Chief Justice Roberts and both Justice Kagan and Justice Breyer nearly doubles (88% increase). The inclusion of Justice Kennedy dampens the total increase though. On the shadow docket, Justice Kennedy is

virtually indistinguishable from Chief Justice Roberts or Justice Scalia, but on the merits, he appears significantly more centrist. Still, the gap between Justice Kennedy and both Justice Kagan and Justice Breyer is 35% larger on the merits than on the shadow docket.



The substantive importance of these observations follows from the understanding that cases are on the merits docket because the Justices chose to put them there. Cases are on the applications docket because parties put them there. Even when we compare the merits docket to a presumably super-polarized subset of the shadow docket, the Court is more polarized in the cases they choose than on the cases that come to them organically.

Recall, the passive virtues are prescriptive. Bickel wants the Court to act in a certain way to achieve certain ends. Specifically, Bickel wants the Court to dodge some politically charged cases.[63] He does not require the Court to dodge them all, of course, but he does urge them to let many, if not most, pass by without comment. What we find, however, is that the cases the Court takes are disproportionately polarizing. This finding is fundamentally inconsistent with the passive virtues but entirely consistent with the active vices.

63. *Passive Virtues*, *supra* note 1, at 42.

These results, if anything, likely understate the extent of the problem. Political scientists have long explained ideological voting at the Supreme Court by building from three key observations:

1. The questions they answer are difficult and do not have easy, purely legal answers, which leave room for non-legal judgments.
2. Justices have ideological preferences.
3. The secretive decision-making process and strong constitutional protections leave Justices largely unmonitored and facing few consequences for making policy-based decisions.[64]

Collectively, these three observations suggest Justices are free to, and will, reason ideologically in the cases before them. These three conditions apply with at least as much force to the subset of applications used in the analysis. Until very recently, there was almost no interest in the shadow docket. Orders issuing from the applications docket are usually unsigned, and Justices rarely explain their decisions. Constitutional protections such as salary protection and good behavior tenure still apply. There is no particular reason to think decision-making on the shadow docket is any less ideological than on the merits docket, at least in the applications that enter the data.

There may be reason to think there are relatively fewer hard questions on the shadow docket that lack easy answers. This could be explained by a collective understanding that parties seeking emergency relief must meet a higher burden. This would create a pull on all Justices to deny relief. This may make decisions on the shadow docket *overall* less divisive than decisions on the merits, but the analysis above does not consider all shadow docket applications. It only considers applications where at least one Justice thought that there was something unusual about the application that was not easily answered by existing law. That is, the only applications considered in the analysis above are the hard questions where at least one Justice was willing to speak up. That suggests that the subset of applications considered should be especially prone to ideological decision-making.

Further, the baseline hypothesis that the shadow docket looks like the set of cases the Court would decide if it did not pick its own cases is almost certainly wrong. It is wrong, however, in a way that only strengthens the conclusions of the test. Not only are the applications included in the analysis limited to the most (presumptively) ideological cases, but the applications docket overall is also somewhat reflective of the types of cases that draw the Justices' interest rather than a random set of cases from the lower courts. Justices send signals to litigants about the types of cases they would like to see, and interested parties find ways to rush them to the Court. This makes the shadow docket look

64. PROVINE, *supra* note 53, at 3–4.

relatively more like the merits docket than it otherwise would, which would lead us to expect that the observed level of polarization on the shadow docket (the up-down distance in the figures above) would be smaller if the Justices were not working to draw certain types of divisive cases onto that docket in the first place. If the gap between the coalitions on the shadow docket was smaller, that would only inflate the relative gap between the two. This suggests that the results above may understate the polarizing effects of the Court's agenda-setting practices.

II. TAKING QUESTION SELECTION SERIOUSLY

The results in the previous part serve as a useful first cut at the problem, but the analysis falls short in an important way: it fundamentally mistakes the Court's agenda-setting practice. That is, Part I follows Bickel and the vast majority of scholars who conceive of the Court engaged in the process of deciding cases. Bickel, and indeed virtually all lawyers and academics since, have conceived of certiorari as the method through which the Court takes a case. That is an error.

The Court does not decide cases; it answers questions. The plain language of the Court's own rules says explicitly that it only considers questions,[65] and the Court carefully guards this limitation.[66] By focusing on questions instead of cases, the Court is engaged in a different type of activity than scholars are used to studying.

Question selection fits cleanly within the contexts of the passive virtues or active vices. Just as Bickel imagined the Court picking cases based in large part on their inherent political dangers, the Court could likewise choose its questions accordingly. A case too important to ignore entirely could be decided on less politicized questions.

An example of this is *Cameron v. EMW Women's Surgical Center, P.S.C.*[67] The case dealt with Kentucky's regulation of second-trimester abortions. A panel of Sixth Circuit judges ruled that the statute was unconstitutional. The State's Secretary of Health and Family Services refused to appeal the decision, so the Kentucky Attorney General (AG) attempted to intervene to defend the statute. The petition for certiorari contained two questions: (1) whether the AG could intervene, and (2) whether the Court should vacate the Sixth Circuit decision in light of a recent Supreme Court decision that the petition said undercut the

65. SUP. CT. R. 14 ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

66. *See* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 34 (1993) ("Our faithful application of Rule 14.1(a) thus helps ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition.").

67. Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002 (2022).

panel's rationale.[68] The first of these questions was a relatively apolitical question dealing with a technical legal point about who has standing. The second question invited the Court to reconsider a recent substantive decision on abortion. In what appears, at first glance, to be a clear exercise of the passive virtues in question selection, the Court granted certiorari only as to the first question.[69]

But notice that there is a vice hidden here as well. The order was manifestly unfair to the abortion clinic. Traditionally, a prevailing party may defend the judgment below on any grounds available in the record. That means that there should be two ways for the clinic to win. It would win if the Kentucky AG lacked standing, or it could win if the statute was unconstitutional. Either way, the judgment below would stand. The Court's certiorari order effectively eliminated one pathway to victory for the Respondent.

The Court may also use question selection in a more active manner to get right to the most politicized issues. Consider another recent abortion case, *Dobbs v. Jackson Women's Health*.[70] In that case, the petitioners raised three distinct questions:

1. Whether all pre-viability prohibitions on elective abortions are unconstitutional.
2. Whether the validity of a pre-viability law that protects women's health, the dignity of unborn children, and the integrity of the medical profession and society should be analyzed under *Casey*'s "undue burden" standard or *Hellerstedt*'s balancing of benefits and burdens.
3. Whether abortion providers have third-party standing to invalidate a law that protects women's health from the dangers of late-term abortions.[71]

Here, the second question would offer the Court an out to decide a technical question about which standard a lower court should apply. The third question provided a narrow, legal question related to standing. This is not to say that the question is unimportant. Indeed, abortion providers' third-party standing is essential for pro-choice litigants who wish to challenge state laws restricting abortion. Rather, the point is only that the question is unlikely to create a political risk for the Court.

It is the first question, the one that squarely raises the constitutional issue and invites the Court to overturn the core holding of *Roe* and *Casey*, that presented the clearest political risk to the Court. Yet when it came time to grant

68. Petition for Writ of Certiorari, Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002 (2022) (No. 20-601), 2020 WL 6516067, at *i.

69. *Cameron*, 142 S. Ct. at 1009.

70. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022).

71. Petition for a Writ of Certiorari, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2020 WL 3317135, at *i.

the petition, the Court limited review to only question one.[72] Thus, even though the Court had alternative pathways to resolve the case without inviting a firestorm of controversy, the Justices intentionally eliminated those alternatives from their review. This order showed the active vices at work.

The rest of this Part explores the intersection of question selection and the passive virtues or active vices. It begins with an empirical question: Is the Court using question selection consistently with the passive virtues or with the active vices? Put differently, do the Justices use the power to choose their questions defensively as a shield to ward off the dangers of politics, or offensively as a sword to jump into the fray? Perhaps unsurprisingly, given the results in Part I, it turns out the Court appears to use this power offensively rather than defensively. The final Subpart considers question selection theoretically. It explores why the Court's question selection practices may drive polarization on the Court and how they undermine the traditional justification for judicial review.

A. Virtue or Vice?: Learning from History and Data

Question selection, indeed any meaningful agenda control, is a relatively new feature of the Court's practice. From the founding through 1891, the Supreme Court's appellate jurisdiction was almost entirely mandatory.[73] During this time, the Court reviewed cases on either a writ of error or an appeal. The former was the common law device that required the reviewing court to examine all legal questions contained in the record to determine if the judgment below was free of material error. The appeal was the equitable analogue to the writ of error. The key difference was that review on appeal also allowed the appellate court to reexamine the facts as well as the law. Review on either error or appeal was both mandatory and comprehensive. The Court was required to hear all cases that fell within the Court's jurisdiction. When it heard a case, it was required to review the entire record for legal error (writ of error) or for mistakes of law or fact (appeals).

The Evarts Act of 1891[74] introduced a measure of discretion in response to a workload crisis in the federal judiciary that was especially acute at the Supreme Court. The Act transformed the Court's appellate jurisdiction in two ways. First, fewer litigants could directly appeal to the Court. Congress channeled diversity cases and all criminal matters to newly created circuit courts of appeals and made their decisions final. This removed a large set of appeals from the Court's mandatory jurisdiction. Second, it gave the Court power to enforce and unify federal law in such cases through certiorari. The Act thus

72. Writ of Certiorari, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

73. *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 24–30 (7th ed. 2015) [hereinafter HART AND WECHSLER].

74. Judiciary Act of 1891, ch. 517, § 6, 26 Stat. 826 (1891).

reduced the number of cases the Court *had* to decide but not the number of cases it *might* decide.

While the Act gave the Court discretion over whether to hear some cases, it did not allow the Justices to choose which questions to answer when it did grant certiorari.[75] Instead, the statute required the Court to proceed "with the same power and authority in the case as if it had been carried by appeal or writ of error . . . ."[76] That is, review—if granted—still encompassed the entire case.

In the following decades, judicial reformers—notably President and later Chief Justice Taft—argued for a vast expansion of the Court's agenda-control powers. Chief Justice Taft was incredibly blunt, arguing the Court should have "absolute and arbitrary discretion"[77] over its agenda. The reformers' efforts resulted in the Judges' Bill of 1925, so named because the Justices wrote the bill for Congress. That bill removed a large set of cases from the Court's mandatory jurisdiction and placed them in an expanded certiorari jurisdiction.[78]

The Judges' Bill did not, however, give the Court power to select questions. This is clear both from the statutory language and the Justices' own testimony in favor of the bill.[79] At the congressional hearings on the Judges' Bill, Justice Van Devanter testified that granting certiorari signaled the Justices all "understand that, in the entire environment of the case, it is one that should be argued at length before them, be considered by them in the light of that presentation and then deliberately decided."[80] He continued, "Granting the writ means, and only means, that the court finds probable cause for a full consideration of the case in ordinary course."[81] Indeed, the common understanding that the Court's obligation to decide "extend[ed] to the whole case and every question presented in it"[82] was central to the Justices' argument for expanded discretion. Precisely because the Justices could not, it was understood, limit questions in cases, the Justices needed the power to avoid cases altogether to prevent the Court's docket from being flooded.

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75. The bill did allow Justices to answer discrete questions if they were certified by the circuit courts. Judiciary Act of 1891, ch. 517, § 6, 26 Stat. 826, 828 (1891).

76. *Id.*; *cf.* Judiciary Act of 1925, § 237(b), 43 Stat. 936 (1925).

77. William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 18 (1916).

78. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1646–47 (2000).

79. The text of the statute retained the requirement that a grant of certiorari required the Court to proceed "with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." Indeed, the only textual change here was to describe the writ of error as "unrestricted." Judiciary Act of 1925, § 240(a), 43 Stat. 936 (1925).

80. James Craig Peacock, *Purpose of Certiorari in Supreme Court Practice and Effect of Denial or Allowance*, 15 A.B.A. J. 681, 684 (1929).

81. *Id.* Similarly, Justice McReynolds chimed in that certiorari meant that the full case should be "reheard upon its merits." *Id.*

82. *See* Letter from William Howard Taft, Chief Just., U.S. Sup. Ct., to Royal S. Copeland, Sen., U.S. S. (Dec. 31, 1924), *reprinted in* 66 CONG. REC. 2921 (1925).

And yet, one year later, in 1926, the Justices granted certiorari in *Santa Rosa v. Fall* limited to "the existence of authority of counsel who filed the bill to represent complainant."[83] Thus, it took less than a year for the Court to use certiorari to hive off parts of cases for review. In fairness to the Court, *Santa Rosa* did not come to a decision, so the Court never had to grapple with the consequences of its order. The first case where the Court limited its certiorari grant that reached a decision was *Olmstead v. United States* in 1928.[84]

In that case, the petitioners claimed that the wiretaps used against them in their federal criminal trial violated both Washington state law, which was undisputed, and the Fourth and Fifth Amendments, which was in dispute. The petitioners alleged a series of errors as grounds for reversal, but the two most relevant are that it was error, as a matter of federal evidentiary law, to admit evidence collected in violation of state law, and that it was improper to admit evidence obtained in violation of the Constitution. The Court's order granting certiorari expressly limited review to this constitutional question.[85]

Olmstead set the table, and in 1939, the Court changed its rules to state that henceforth, "[o]nly the questions specifically brought forward by the petition for writ of certiorari will be considered."[86] That has been the rule ever since, even though Congress mandated—and the Justices promised—review of the entire case.

Olmstead teaches several lessons about the Court's question-selection power. First, the Court gave itself this level of discretion, thus enhancing its own power. Second, the Court took this power precisely to engage in constitutional politics when it might otherwise have decided the case on less politically dangerous evidentiary grounds. That is, the Court did this because it wanted to get into the thick of things, not because it wanted to stay out.

The power to narrow review to targeted questions emerged not from statutes but from the Court's shadow docket when the Court, on its own initiative, began targeting specific questions in its orders granting certiorari.[87] What began as an exceptional practice has evolved since. For instance, in 1939, the Court amended its rules to limit consideration to "only the questions specifically brought forward by the petition for writ of certiorari . . . ."[88]

Further, the Court felt a growing freedom to manipulate those petitions to limit review to the questions that interested the Court. The Justices developed

83. Pueblo of Santa Rosa v. Fall, 273 U.S. 315, 316 (1927).

84. Olmstead v. United States, 277 U.S. 438 (1928).

85. *Olmstead*, 276 U.S. 609, 609 (1928). The eventual decision drew four dissents, three of which relied on grounds outside the scope of certiorari. *See id.* at 469–88 (dissenting opinions by Holmes, J., Brandeis, J., Butler, J., and Stone, J.). Justice Stone wrote that the limited grant of certiorari did not restrict the scope of issues the Court could consider; instead, it could only restrict the scope of the parties' arguments. *Id.* at 488.

86. *Compare* SUP. CT. R. 38 para. 2 (1939) (limiting considered questions to those in a writ of certiorari), *with* SUP. CT. R. 38 para. 2 (1928) (providing no certiorari limit to considered questions).

87. *E.g.*, *Pueblo of Santa Rosa*, 273 U.S. at 678.

88. SUP. CT. R. 38 para. 2 (1939).

various methods to get questions they wanted to answer in front of the Court, even if it was not actually presented by the parties in some cases. This development emerged from the variety of linguistic formulations intended to limit questions for review. In *Olmstead*, the Court wrote out the constitutional question in its order granting certiorari, but the substantive question itself was asked by the parties.[89] Chief Justice Hughes began the practice of identifying the limited question by number (e.g., certiorari granted but "limited to the first question presented by the petition"[90]) in 1937, which gradually became the norm. Chief Justice Stone would "request" counsel to discuss certain questions.[91] Sometimes, Chief Justice Warren would "invite" counsel to address questions in addition to the merits.[92] These different formulations made it hard for observers to identify when the Court was rephrasing a question or asking a new one entirely.

When the Court writes its own questions, it sometimes simply reformulates a question asked by the petitioner. Other times, it directs parties to address questions raised by the respondent[93] or by amici, especially for the Solicitor General.[94] But at other times, the Court directs parties to address questions not raised in the petitions.[95] The Court might even do this when the petitioner intentionally refuses to raise the question on certiorari.[96] The Court might also prompt the parties—either in the initial certiorari order or upon an order for rehearing—to discuss whether the Court should strike down specific precedents.[97] The Court might even do this when the petitioner explicitly waived the relevant constitutional objection below.[98] And if the Court cannot get one of the parties to argue a question it wants to tee up, it will simply appoint a lawyer to represent the judgment below.[99] These self-generated powers give

89. *Compare Olmstead*, 276 U.S. at 609, *with* Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 2, Olmstead v. United States, 276 U.S. 609, 609 (1928) (No. 493).

90. United States v. Jackson, 302 U.S. 673, 673 (1937).

91. *E.g.*, Radio Station Wow v. Johnson, 323 U.S. 705, 705 (1944); Ala. State Fed'n of Lab. v. McAdory, 323 U.S. 703, 703 (1944); Cong. of Indus. Orgs. v. McAdory, 324 U.S. 832, 832 (1945).

92. *See, e.g.*, Konigsberg v. State Bar of Cal., 351 U.S. 936, 936 (1956); Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Brownell, 355 U.S. 812, 812 (1957).

93. *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 459 (9th ed. 2007) (citing Jones v. United States, 527 U.S. 373, 396 (1999); Verizon Commc'ns, Inc. v. FCC, 531 U.S. 1124 (2001); Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327 (2002)).

94. *See id.* (citing Ragsdale v. Wolverine World Wide, Inc., 533 U.S. 928 (2001)).

95. *E.g.*, Payne v. Tennessee, 498 U.S. 1076, 1076 (1991).

96. *See* Colorado v. Connelly, 474 U.S. 1050, 1050 (1986); GRESSMAN ET AL., *supra* note 93, at 460.

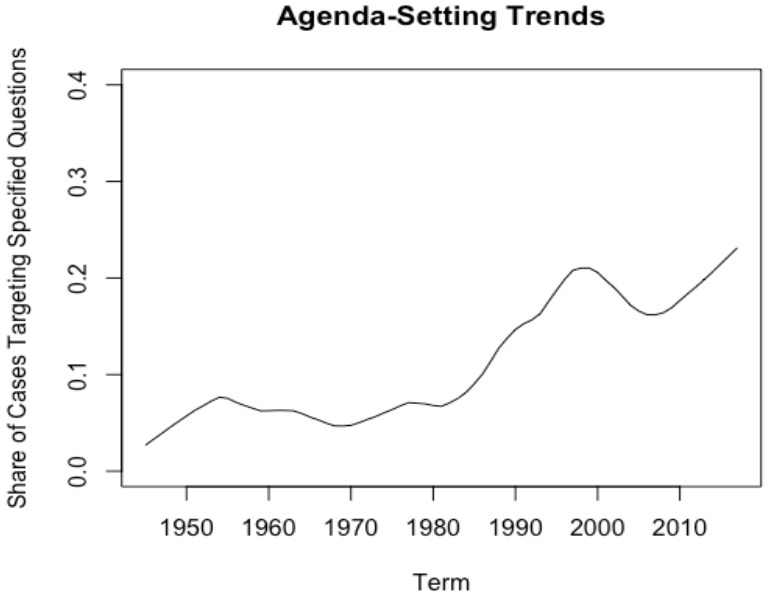
97. *See, e.g.*, Patterson v. McLean Credit Union, 485 U.S. 617, 617 (1988); Pearson v. Callahan, 552 U.S. 1279, 1279 (2008).

98. *E.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318, 329–30 (2010); *see also* Monaghan, *supra* note 5, at 690.

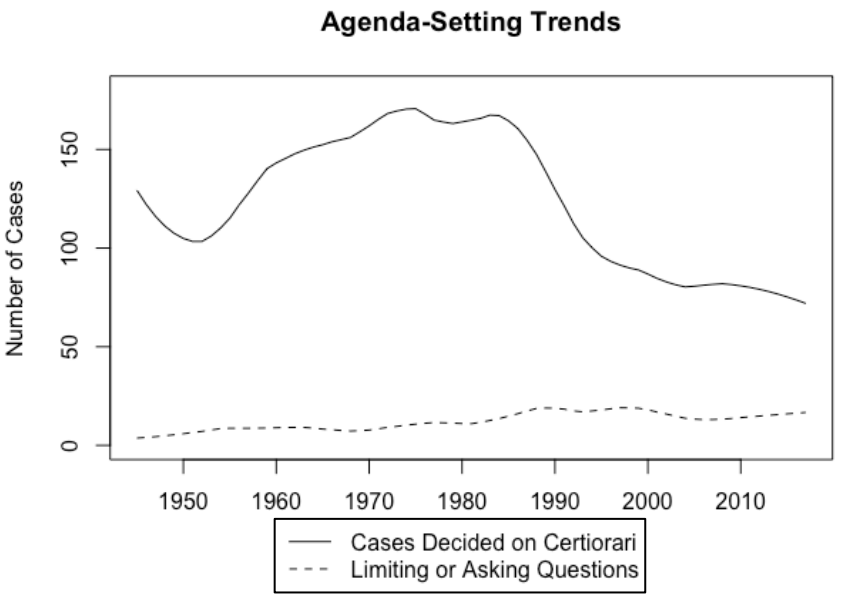
99. *See* Cheng Fan Kwok v. INS, 390 U.S. 918, 918 (1968); Dickerson v. United States, 528 U.S. 1045, 1045 (1999); Pepper v. United States, 562 U.S. 476, 487 (2011); Mata v. Holder, 574 U.S. 1118, 1118 (2015); *see also* Monaghan, *supra* note 5, at 692 ("Litigants have interests; but judgments?"); Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533, 1533 (2016).

the Court the ability to target virtually any question tangentially raised by a case at will.[100]

The power to aggressively target questions by manipulating the certiorari order has been a growing theme in the Court's practice, as seen in the following figures. The first plots a smoothed curve for the proportion of cases where the Court targets questions. What was once a relatively rare occurrence now makes up between a fifth and a quarter of the docket. The second figure shows how this came to be. It plots smoothed curves for the number of cases that the Court decided on certiorari and the number of cases in which its order granting certiorari limited review to specified questions either by identifying a subset of the questions presented by the parties, or by writing out questions asked by the Justices. The Court has slowly been increasing its use of these more aggressive agenda-setting techniques, even as its docket has shrunk dramatically. As such, cases in which the Court aggressively selects its questions make up a significantly larger portion of the docket than in the past.



100. Still, the Court is somewhat limited by the existence of an actual case through which it could take up the question. Even here, though, the Court has become more proactive. The Justices use their opinions and dissents from denials of certiorari to call for litigants to generate cases that will prompt certain questions or to offer a how-to manual for litigants to get a particular question to the Court. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1869–72 (2017) (Thomas, J., concurring in part and concurring in the judgment); Gill v. Whitford, 138 S. Ct. 1916, 1934–41 (2018) (Kagan, J., concurring).



Given this history, and the slow but steady increase in more aggressive question selection seen in the above figures, it is easy to see how people lost sight of the radical transformation in the Court's practice.[101] What these figures cannot show and the history cannot reveal is whether the Court targeted questions in ways that honored the passive virtues or engaged in the active vices.[102] As a theoretical matter, both are possible. The next Part turns to a series of statistical tests to see whether the Court generally acts according to the passive virtues or the active vices.

B. An Empirical Study of Aggressive Question Selection

Certiorari may have been designed to engage the Court's familiar writ of error machinery that would require the Court to decide the case, but it has developed into something quite different. Certiorari now lets the Court "decide the issue it wants to decide."[103] Through certiorari, the Court has achieved Taft's great dream of "absolute and arbitrary discretion" over its agenda.[104] How the Court uses such discretion is up to the Justices.

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101. It is also worth pointing out that Congress had more pressing issues in the 1930s and 1940s than policing the Supreme Court's certiorari powers. Further, the academy was more focused on the Court's more flagrant violation of its "mandatory" jurisdiction. *See supra* notes 35–50.

102. *See* discussion *infra* Subpart II.B, where I argue it is the latter.

103. GRESSMAN ET AL., *supra* note 93, at 467.

104. Taft, *supra* note 77, at 18.

There are three possible uses. First, the Court could use this power neutrally. For example, petitioners may present bad questions alongside good ones, or they might frame a good question in a poor way. The Court might use its question-selection power simply to clear away the chaff.

Second, the Court could use its power to target questions as a shield. Some cases may simply be too important to ignore. If these questions raise thorny political questions that could imperil the Court, the Justices could limit review to technical legal questions.[105] When pressed to take and decide certain cases, the Court can choose to focus on technical or otherwise narrow grounds. The Court could also choose to resolve the questions for which there is greater agreement on the bench or at least lower risk of backlash from Congress or the public.

Third, and most actively, the Court could wield question selection offensively. Per Chief Justice Warren, the Court's certiorari jurisdiction, "particularly the part that permits the Court to select and reject the issues submitted to it for decision, was designed . . . to permit the Court . . . to establish our national priorities in constitutional and legal matters."[106] This is certiorari as a sword. That sword, however, is likely double-edged. Setting national priorities—to say nothing of the power to decide self-selected policy issues—is a power generally considered to be allocated to the political branches. That is, they are powers wielded by politicians. Wielding these tools, the Justices risk becoming viewed as politicians in robes. If so, the Court will soon be seen as an unelected, and perhaps illegitimate, legislature.

The question addressed in this Part is which of these three modes characterizes the Court's current practice in the main. Importantly, the claim is not that the Court *always* acts defensively or offensively in political cases. Whether in presidential politics or Free Exercise challenges to pandemic orders, the Court sometimes ducks and sometimes jumps in. Instead, the question is whether question selection politicizes or depoliticizes the Court overall. Put differently, the goal is to identify the primary outcome of the Court's question-selection powers: engagement with or avoidance of politics.

The rest of the Part describes the data, tests, and results, but an initial summary is helpful.

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105. Indeed, this is a close cousin to Bickel's suggestion that the Court uses standing concerns to avoid politicized issues. *See Passive Virtues*, *supra* note 1, at 43, 75–76. Of course, it may be impossible for the Court to fully avoid the politicized issue if it affirms. Even if it expressly limited review to the technical question and affirmed on that basis alone, the popular perception would be that the Court endorsed the policy. Such was Bickel's fear. See *id.* at 48. Further, as argued in discussion, *infra* Subpart III.A, it is not clear that in some cases, the Court could, at least as a formal matter, affirm without deciding the divisive question, at least implicitly.

106. Burger & Warren, *supra* note 7, at 728.

1. There is no evidence that the Court deploys its question-selection powers in more important cases.
2. There is a strong correlation between using the question-selection power and increased politicization (measured by the number of amicus briefs).
3. There is a strong correlation between using the question-selection power and the probability of a 5–4 decision.
4. Politicization and divisiveness (measured by amici and 5–4 outcomes, respectively) are significantly increased when the Court adds a constitutional question to the petition or removes a statutory question.

Taken together, these findings suggest that when the Court selects questions, it politicizes itself in exactly the ways Bickel feared. The results are consistent with, but not proof of, the hypothesis that the Court uses certiorari as a sword rather than as a shield—that the Court most often exercises active vices rather than passive virtues.

1. Data and Hypotheses

The data in this Part were drawn from several sources. First, I used the Supreme Court Database to identify all of the cases decided through certiorari from 2001-2020. This database is the foundation of virtually all empirical research on the Court in both law and political science, and it contains a plethora of case-specific information including issue area.[107] The database also includes information on how each Justice voted in each case. I used these data to construct a variable that takes on a value of 1 if the Court is split five-to-four and a value of 0 otherwise.

Second, I recovered the orders granting certiorari in the cases and coded a case as a 1 if the Court exercised its question-selection powers. Cases where the Court simply granted the petition as written were coded as 0. Using these orders and focusing on petitions where the Court did target particular questions, I also coded whether the Court added or subtracted a constitutional, statutory, or procedural question. Third, I turned to the docket sheets for each case and counted how many amicus petitions were filed before the Court granted certiorari, how many motions for leave to file an amicus brief were made prior to the certiorari grant, and how many amicus briefs were filed after the Court granted certiorari.

The data include three variables of particular interest. First, the *Targeting* variable takes on a value of 1 if the Court targeted particular questions, either limiting the questions considered to a subset of the presented questions in the

107. Issue areas are taken from the Supreme Court Database (*issueArea* variable). *See* WASH. UNIV. IN ST. LOUIS SCH. OF L., *The Supreme Court Database*, http://scdb.wustl.edu/documentation.php?var=issueArea.

petition or writing its own question for the parties to address. This is effectively the treatment variable.[108] The tests below show that this treatment is positively correlated with greater politicization and division on the Court.

Second, the *Amici* variable captures the number of amicus briefs filed at the merits stage of litigation. Since amicus briefs are often filed by politically engaged elites, a larger number of amicus briefs implies greater engagement with political elites. This is especially true since groups like the ACLU, NAACP, and CATO, who are sophisticated legal players, file lots of briefs and thus provide something of a stable baseline. When we observe an abnormally large spike in interest group participation as amici, it is a strong signal that the question the Court is considering is now interesting to political interest groups that are not regular amici.

Third, I constructed a *tooclose* variable that takes on a value of 1 when the Court decides a case with a one-vote margin or if there is a tie. The most common such outcome is the traditional 5–4 split vote. It is something of an open question as to whether 5–4 decisions are, in fact, harmful to the Court's legitimacy. Some scholarship suggests that such cases might burnish the Court's legitimacy because the losers feel their side was heard.[109] Others worry that "a five-four decision focuses more attention on the predispositions of the individual Justices, and it feeds the cynicism of the legal realist."[110] On this view, a 5–4 outcome makes "[t]he Court appear[] less objective and less above the political fray. When the legal community and the general public perceive that the law is being shaped more by narrow head counts and factional voting than by reason, discourse, and consensus, the Supreme Court's decisions earn less respect and long-term legitimacy."[111] This seems to be Chief Justice Roberts' view.[112]

Given these key variables, it is now possible to generate empirical hypotheses:

Shield hypothesis: The Court uses its question-selection power to avoid politically charged and divisive questions. This has two empirical implications:

108. It is important to remember that because this treatment is not assigned exogenously, none of the results prove causality.

109. *See* Michael F. Salamone, *Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size*, 67 POL. RSCH. Q. 320, 324–31 (2014).

110. Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 942 (2003).

111. *Id.* at 942–43.

112. *See* Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan. 1, 2007, 12:00 PM), http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/. Rosen attributes to Chief Justice Roberts the view that "5–4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics." *Id.*

1. The Court should use the power in the most important questions and divisive issues, and
2. When the Court uses its question-selection power,
    a. it reduces the number of amicus briefs filed and
    b. lowers the probability of a narrow majority.

Neutral hypothesis: The Court uses its power only to avoid tedious questions or rewrite poorly drafted queries. This implies there should be no relationship between the use of the Court's power and the number of amicus briefs or the size of the majority.

Sword hypothesis: The Court uses its question-selection power to focus on the most politically salient and divisive questions. This draws the Court into politics and divides the Court. This is observed in:

1. more amicus briefs being filed and
2. a higher probability of a narrow outcome.

As an initial matter, there are reasons to expect any of these hypotheses could be correct. The shield hypothesis is essentially Bickel's passive virtues applied to questions instead of cases. If the Court has an interest in avoiding political risk generally, then there is no reason that concern should not operate at the level of question selection. The neutral hypothesis starts with the observation that the Court only ever grants certiorari to questions the Justices want to answer. That is to say, experienced lawyers know the Justices will narrow the questions—or deny the case outright—if the lawyers do not limit the questions themselves in the petition. Given the development of a specialized Supreme Court bar, experienced litigators are now very adept at limiting the questions they present to the ones the Justices want to take. If the Court ever has to limit a question or write its own, that merely demonstrates that the lawyers messed up. There is no reason to expect such a mistake would correlate with more amicus participation or more divisive decisions.

Finally, as Chief Justice Warren's quote above demonstrates, at least some Justices view the certiorari power as a sword. Moreover, the Court's shift from an arguably less political case-adjudication model to a more politically engaged law declaration model corresponds with its turn toward protecting individual rights[113] and its enhanced certiorari powers. For instance, once the Court gained discretion to avoid constitutional cases arising from state courts, it almost immediately started incorporating the Bill of Rights.[114] It is difficult to imagine that the Court would have incorporated the Fourth, Fifth, Sixth, and Eighth

113. HART AND WECHSLER, *supra* note 73, at 73–75.

114. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

Amendments if every state criminal conviction or sentence challenged on those grounds would come before the Court for mandatory review.[115]

One can also see a strong relationship between the Court's more recent practice of writing questions for the parties and its pronouncement of politically charged decisions. Major issues addressed in landmark cases by the Court through a question of its own devising include: the right to counsel,[116] the 2000 presidential election,[117] same-sex marriage,[118] class certification,[119] recess appointments,[120] the recognition of Jerusalem as a part of Israel,[121] and whether the Deferred Action for Parents of Americans (DAPA) program violated the Take Care Clause.[122]

The existence of such plausible yet contradictory hypotheses suggests a more rigorous empirical study of the Court's agenda-setting practices is necessary. Such an analysis faces two main challenges. First, because the Court's practice of limiting questions evolved slowly, it is essentially impossible to separate the effects of the slow change in the Court's docket management tactics from other factors (e.g., changing politics or substantive law). Second, the Court does not select questions randomly, so causal claims are statistically suspect. Suppose the Court only uses aggressive agenda-setting techniques (narrowing the petition or writing its own questions) in politically salient cases. If so, it would be unsurprising that the Court appears to be "more political" in cases where it is more aggressively setting the agenda. For example, if the Court only wrote its own questions in abortion and affirmative action cases, then writing questions would likely correlate with politicized cases, but one would reasonably assume it was the issues rather than agenda-setting driving the finding.

To address these concerns, I include controls for several variables that help mitigate these concerns. Specifically, to control for time trends, I include a fixed effect for each term. Thus, if 2016 is systemically different from other years because of the change of time, that systemic change will be captured by the fixed effect. To control for the fact that some issues are more likely to be politicized than others, I add fixed effects for the issue areas. Most importantly, to address the concern that some cases are more political than others, I control for amici participation at the certiorari stage.[123]

115. Hartnett, *supra* note 78, at 1732.

116. Gideon v. Wainwright, 372 U.S. 335 (1963).

117. Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70 (2000).

118. Hollingsworth v. Perry, 570 U.S. 693 (2013); United States v. Windsor, 570 U.S. 744 (2013).

119. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

120. NLRB v. Canning, 573 U.S. 513 (2014).

121. M.B.Z *ex rel* Zivotofsky v. Clinton, 566 U.S. 189 (2012).

122. United States v. Texas, 578 U.S. 917 (2016).

123. In addition, I add additional pre-treatment controls from the Supreme Court Database related to the lower court decision, the presence of a circuit split, whether the question was important, whether the United States or a state was a party, and some circuit fixed effects.

2. The Court Is Not Primarily Selecting Questions Based on Importance or Politicization

The remainder of this Part and the next will show a series of models that strongly suggest the Court's use of its question-selection power is correlated with increased politicization and divisiveness. An obvious concern is that the Court may be using the power in the most politicized and divisive cases. That is, perhaps the Court wields question selection as a shield in politically important questions, but that neither prevents those cases from drawing political interest nor renders them less divisive. That is, perhaps if the Court did not use this power in these cases, things could have been worse. At the heart of this objection is the idea that perhaps the case is intrinsically politically important or divisive, and the Court is merely reacting to the case.

As described above, this Part treats amicus participation during the merits phase as a proxy for politicization. Yet, as implied above, amici can file motions and briefs during both the merits and the certiorari phase. If the Court is merely reacting to the case and a case is intrinsically politically salient, then the obvious implication is that there should be more amici participation throughout. That is, if the case is naturally political, political actors should show greater engagement during the certiorari process as well as during the merits phase.

The most direct way of examining this question is to compare the amount of pre-certiorari amicus participation in cases where the Court targets questions (again, by limiting review or adding questions) with pre-certiorari amicus participation in cases where the Court does not target.[124] The standard statistical operation for this is a simple t-test. Under the null hypothesis that there is no difference between the two sets of cases, a researcher should reject the null—and therefore conclude that the Court is targeting more when there are more amici—if the "p-value" is less than 0.05 (that is, if there is less than a 5% chance that the difference between the two sets results from randomness). When run, the t-test recovers a p-value of 0.915, which is insignificant.[125] This provides no statistically significant evidence that the Court targets questions more or less often when there is more amicus participation at the certiorari stage.

The figure below shows the output of a logistic regression that attempts to uncover the factors that do correlate with the Court's decision to target questions.[126] The only statistically significant result is the fixed effect on cases emerging from the D.C. Circuit Court, suggesting the Justices are more likely to target questions emerging from that court. The two variables at the bottom

124. A similar analysis reveals that the Court targets questions in 25% of cases when the Solicitor General (SG) participates in the certiorari stage and in 20% of the cases when the SG does not.

125. *See* Sunirmal Choudhury et al., *Supine Versus Prone PNCL in Lower Calyceal Stone: Comparative Study in a Tertiary Care Center*, 88 UROLOGIA J. 148, 150 (explaining that a p-value of 0.9 is statistically insignificant).

126. Year fixed effects were suppressed to create the figure but included in the model. The results are not materially different without term fixed effects.

"totalPre" and "totalMotions" capture the number of amicus briefs and number of motions seeking leave to file amicus briefs filed before the Court granted certiorari. The former reveals no evidence of an effect with an estimate of almost 0. The effect of motions is not significant, as the uncertainty bar still crosses 0. Nonetheless, the point estimate is negative, suggesting that if anything, the Court is less likely to target questions when there are more motions requesting leave to file amicus briefs.

The last thing to notice is the variable third from the bottom, "judRev," which takes on a value of 1 if the Court engaged in judicial review of a federal statute in the case and a value of 0 if it did not.[127] As with nearly all other variables in this analysis, there is no statistically significant evidence that the Court's decision to target a specific question is related to whether or not the case will involve judicial review.

This finding is a direct test of the first part of the shield hypothesis. Recall that if the Court uses this power as a shield to protect itself from the most politically risky cases, we should observe the Court targeting questions in the most politically salient cases. The evidence does not support that hypothesis.

127. Keith E. Whittington, *The Judicial Review of Congress Dataset, 1789–2022*, PRINCETON UNIV., https://scholar.princeton.edu/kewhitt/judicial-review-congress-database (last updated July 2022).

3. Question Selection Strongly Correlates with More Amici Participation on the Merits

A large number of amicus briefs "signals to jurists that the case has substantial public policy implications, having been briefed by entities that are not parties to the case, but who nonetheless believe the case will affect their interests."[128] Since interest groups are often policy-motivated and deeply engaged in politics, many peer-reviewed studies use amicus briefs as a proxy for political salience.[129] Accordingly, if cases where the Court narrows the petition to a subset of questions or writes its own question draw more amici than cases where the Court just takes the questions presented as they find them, that might signal the Court's agenda-setting practices are bringing the Court directly into contact with sophisticated political interest groups and raising the political stakes of any decision.

As before, the first step is a basic description of the data. When the Court exercises its question-selection power, it draws an average of 12.1 amicus briefs at the merits stage. In contrast, when it does not target questions, it draws only 11.3 questions. That is a difference of nearly a full amicus brief in cases where the Court targets questions.[130]

Once again, however, more sophisticated statistical techniques are available to further investigate the question. The notable difference in the data at this stage is that the number of amicus briefs is not limited to 0 or 1. Instead, the number of briefs can take on any countable number starting with 0. The figure below shows the relevant estimates from a negative binomial model, which is used to model such count data.

The dependent variable is the number of amicus briefs filed after the Court granted certiorari. That is, the model is trying to explain the amount of amicus participation in the merits stage. As before, the full model controls for case-specific factors (issue area, lower court decision, etc.) and includes fixed effects for terms. The figure shows results for four of the independent variables in the model: an indicator variable for judicial review, the two pre-certiorari amicus controls, and an indicator variable for whether the Court targeted a question.

Unsurprisingly, when there is more amicus participation before certiorari is granted, there is likewise more amicus participation after. After all, it is to be expected that amicus participation is an excellent predictor of amicus participation. Similarly, judicial review cases draw more amici than other cases.

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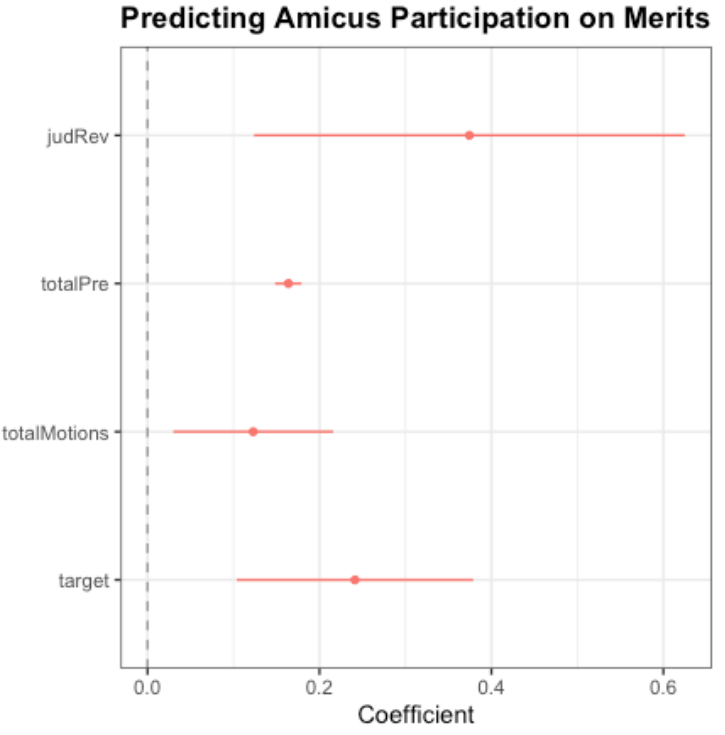
128. Paul M. Collins, Jr., *Amici Curiae and Dissensus on the U.S. Supreme Court*, 5 J. EMPIRICAL LEGAL STUD. 143, 146 (2008).

129. Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 131 (2004); FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 45–46 (2000); Paul J. Wahlbeck et al., *The Politics of Dissents and Concurrences on the U.S. Supreme Court*, 27 AM. POL. Q. 488, 500 (1999).

130. The median number of amicus briefs on the merits in cases where the Court targets a question is seven against six when the Court does not.

These significant results offer some validation for the model itself. The more important result for present purposes, however, is the bottom point estimate and confidence interval. The "target" variable, which signals whether or not the Court aggressively targeted a question, is significantly correlated with greater amicus participation—greater politicization—on the merits.



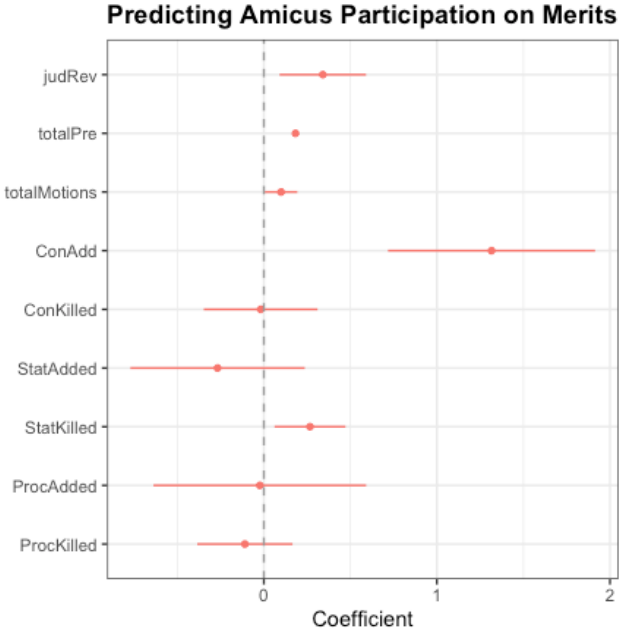
The importance of these findings is clear given the hypotheses developed above. The Shield hypothesis predicts a negative correlation between question selection and amici participation. The Neutral hypothesis suggests a null relationship. The data reveals a statistically significant positive relationship. These data allow us to reject the Shield and Neutral hypotheses, at least as it relates to amici participation, which is the proxy for politicization. On the other hand, the data are in line with the Sword hypothesis. That is, they are consistent with the active vices.

We can dig deeper within the subset of cases where the Court targets questions. The figure below shows the results of another negative binomial model explaining amicus participation on the merits. This time, instead of collapsing all targeting into a single variable, the model counts the number and types of questions added to or subtracted from the petition. This allows us a

tighter view as to the types of decisions that appear to be driving the main results.

As expected, pre-grant amicus participation continues to be significantly correlated with participation on the merits as does judicial review. The substantively interesting findings, however, are that adding a constitutional question or eliminating a statutory question significantly correlates with greater amicus participation.

Given the Court's announced practice of avoiding constitutional issues when cases can be decided on a statutory basis, these findings tell a coherent story. Adding a constitutional question signals that the Court is interested in the particular constitutional issue. Similarly, when the Court eliminates a statutory question, it is eliminating a barrier to addressing a constitutional issue present in the case. Thus, these two results tell a consistent story that when the Court uses question selection to pave the way to a decision on a constitutional question, the case becomes more political.



4. Question Selection Strongly Correlates with Narrow Majorities

The remaining parts of the hypotheses to test relate to the divisiveness of cases. The measure of divisiveness used here is a binary measure that takes on a value of 1 if the winning coalition is 0 or 1 vote larger than the losing

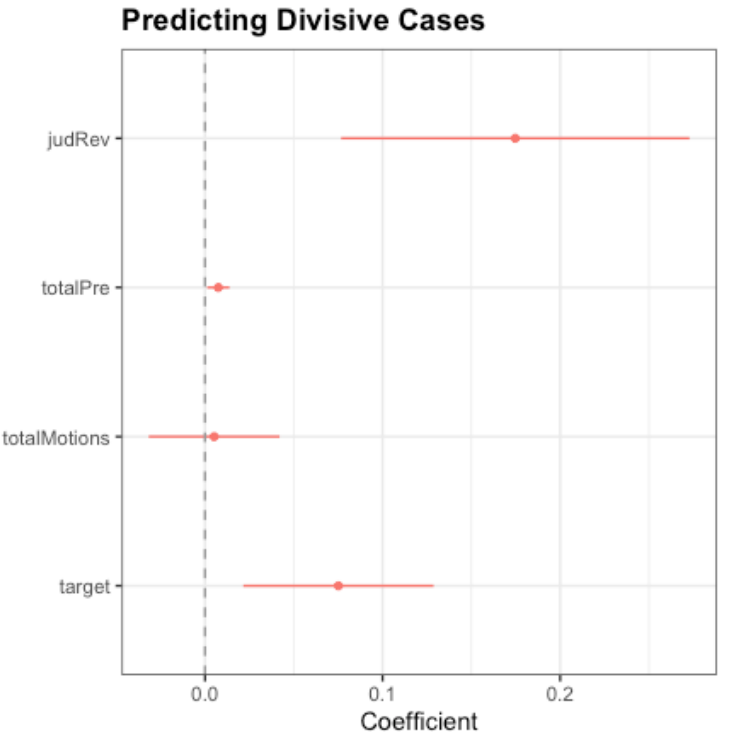
coalition.[131] The most common such outcome is a 5–4 decision, but if the Court is shorthanded, a 4–3 or a 4–4 outcome would also be considered a narrow majority. If the winning coalition contains at least two more Justices than the losing coalition, the variable takes on a value of zero.

Descriptively, while 46% of cases in the data are unanimous, just under 19% of all cases end in narrow majorities (or ties). Among cases where the Court limits its questions, that share jumps to 26% as compared to 17.6% among cases where the Court simply grants the petition as submitted. Thus, there is strongly suggestive evidence at the start for the proposition that question selection does not reduce divisiveness.

This speculation is borne out by more robust statistical models. For interpretability, the figure below shows the output of a linear probability model. In that model, even after controlling for case-specific covariates, the probability of a narrow outcome increases by 7.5 percentage points.[132] What is more revealing is that the model suggests the baseline probability (the intercept) is only 3.8%, which means that the Court selecting its own questions nearly doubles the likelihood of a 5–4 outcome! Thus, not only are the results statistically significant, but they are also very substantively significant as well. The effect is even stronger for judicial review cases, which adds more than 17 percentage points to the probability of a 5–4 outcome.

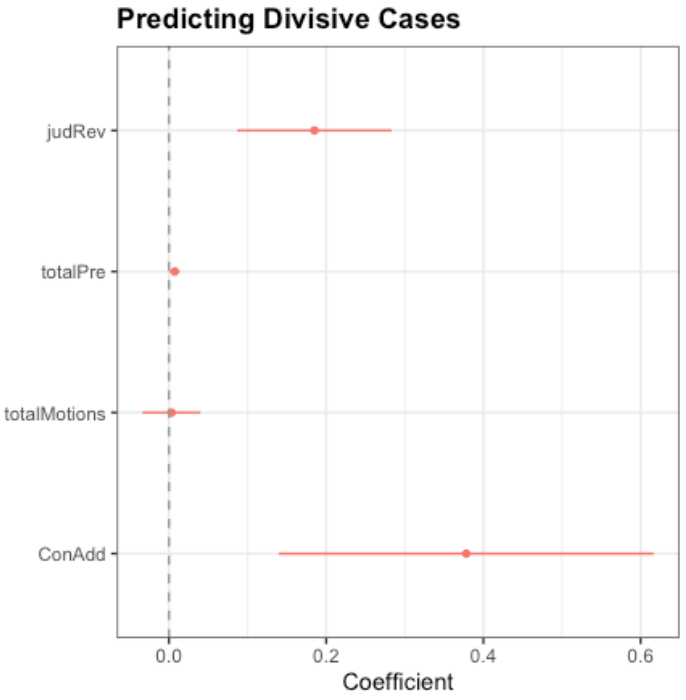
131. Since the decision below is affirmed in the case of an equally divided vote, it is possible to have the winning and losing coalitions be of equal size.

132. The p-value is again 0.001.



Once again, these tests cast severe doubt on the Shield and Neutral hypotheses. If the Court used question selection to focus on questions that could generate consensus, one would expect fewer narrow majorities. If the Court simply uses question selection ministerially to fix lawyers' mistakes, one would expect to see no relationship. Instead, there is a large and statistically significant relationship between the decision to target questions and narrow majorities, even after controlling for case-specific factors.

As with the amici data, we can look more closely at the types of questions the Court adds or subtracts. The figure below shows, once again, that adding a constitutional question to the case has significant effects. Within the model, adding a question increases the probability of a narrow majority by almost 38%. Again, the baseline probability of a narrow vote in the model is only 7%. This means that adding a constitutional question increases the chance of a bare majority (or tie) five times. These results are unsurprising when we reexamine the raw data. It shows that half of the cases where the Court added a constitutional question ended with Justices splitting 5–4. In all other cases, narrow majorities occurred less than 19% of the time.



Once again, the Court appears to exercise its question-selection powers to divide itself just as before it appeared to draw itself deeper into politics. Overall, it appears that the Court is more engaged in the active vices than the passive virtues. Again, the claim is not that the Court is only active. It does regularly dodge difficult questions. However, in the main, it is clear that in the cases where the Court most aggressively targets questions, it is more politicized and divided.

As with the previous analysis, the results presented here likely underestimate the dangers of the Court's discretionary agenda-setting powers. The size of the effect is almost certainly dampened by the presence of a highly professional Supreme Court bar. Lawyers with extensive expertise at drafting petitions for certiorari are likely quite capable of distilling the questions presented to only those likely to capture the Justices' attention. That means that in many of the cases in the control group, consideration is already limited to the questions the Court wants to see. Since this limitation is invited by the petitioners' own motions, however, such cases are considered controls.

This means that petitions in the control group are closer to the treatment group (petitions where the Court added or limited questions) than one would naturally expect. Closing that gap would shrink the size of the observed effect. For interpretive purposes, if the statistical analysis returned null results, one would be concerned that an effect exists but is merely covered over by the bar's

ability to anticipate the questions the Justices want to answer. However, the results show a statistically significant effect even with the bar writing questions with an eye on the Justices' preferences. That provides additional confidence in the results and suggests that the magnitude of the effect may be understated.

Second, and perhaps more importantly, question selection is an enhancement of the Court's case selection powers. Recall that the analysis in Part I showed that the Court appears more divided in the cases it chooses than it does on the shadow docket, which presumably looks more like the docket the Court would face if it drew cases randomly. The shadow docket is the closest thing one can find to a true control group to consider case-selection, but even that analysis is limited because the merits votes are ultimately on the questions the Court decides rather than the cases themselves.

Still, a compelling story consistent with the data is that when the Court uses agenda-setting powers, it becomes more political. When it targets specific questions, it is more politicized than when it just grants the petition. When it decides an emergency motion in full, it is less divided than it is when it takes the "case" on the merits. In every instance, the more control the Court uses, the more it is politicized. This suggests two things: First, if the Court stopped targeting questions, it would be less politicized; second, that may not be enough, because targeting cases still invites the active vices.

Finally, the empirical results above invite speculation about a counterfactual world where the Court grants certiorari to review an entire case, decides the questions it wants, and remands. Insofar as this is a possibility, one would think that the present situation is better because it at least gives the parties notice as to what they should talk about and gives the Justices the best briefing on the issues they will decide.

There are good reasons to reject this argument. First, as an empirical matter, the results above suggest that when the Court targets questions, it draws special attention. If the Court stops targeting questions, it stops sending the signals, and one would expect the extra amici, for example, to fade away. That is, if one accepts the analysis above, in the counterfactual world, there is no treatment at all, so the results should simply look like the control group: fewer amici and a lower chance of 5–4 outcomes.

More fundamentally though, the hypothetical world where the Court grants review to the whole, decides the part, and remands the rest is a difficult one to maintain. The Court's willingness to remand is an effect of its focus on questions. Since remand is downstream of question selection, it would be hard for it to function as a substitute.

This is relatively easy to see in the case where the Court affirms the decision below. Suppose the judgment rests on answers to six separate legal questions, but the Court only wants to review question one. To affirm the judgment, the Court would have to agree that the lower court was correct on all six issues.

Suppose further that a majority of the Court, if it considered question two, would agree that the lower court got it wrong.

If the Court can limit review to question one, then it checks the decision, and if it thinks the lower court was correct, it affirms. If, however, the Court has the entire case in front of it, a dissenting Justice has an additional option. She can raise question two and force the other Justices to deal with it. Once that happens, the judgment below is reversed, and the majority's view on question one is rendered dicta (if it is even addressed in the opinion), since it is not essential to the judgment in a case. Alternatively, the Court might dismiss the petition as improvidently granted. Either way, it would be difficult for the Court to simply answer the interesting question and then remand the rest.

III. THE ACTIVE VICES AND QUESTION SELECTION: SOME THEORY

So far, this Part has pursued a series of descriptive claims. First, the Court selects and answers questions, not cases. Second, this practice is rooted on a suspect reading of the relevant statutes and a troublesome history that suggests the Court has been quite aggressive in pursuing "absolute and arbitrary" control over its docket. Third, the Court's particular practice of targeting particular questions is strongly correlated with deeper engagement with politics and deeper divisions on the Court. This last Part turns from description to theory.

The active vices intersect with question selection in two ways that relate to the politicization and division observed in the previous Part. First, question selection removes *the* Court from the traditional activity *of* courts: dispute resolution. Instead, the Court identifies a particular question—almost certainly one with significant policy implications that could otherwise be decided by Congress—and answers it. As such, it is hardly surprising that political elites show up in droves as amici to participate. Still, this is a descriptive claim, not a theoretical one. The related theoretical insight relates to judicial review. As shown below, question selection undermines the classic justification for judicial review.

The second theoretical insight relates to the prevalence of 5–4 outcomes in cases where the Court selects questions. The answer turns out to be a relatively straightforward application of the median voter theorem. Essentially, focusing review to a single question makes the case entirely one-dimensional. In such a situation, the median Justice gets what she wants since there is no way to bargain along other dimensions.

A. A Challenge for Judicial Review

If there is any contribution for which Bickel is more famous than the passive virtues, it is the famous counter-majoritarian difficulty. The question

Bickel raised is how it could ever be democratically legitimate for an unelected Court to overturn the will of an elected legislature.[133] This puzzle has become the ongoing obsession of constitutional theorists ever since.

It is worth noting that the passive virtues are an important part of Bickel's own response to the difficulty. Since overturning statutes is sometimes necessary but always anti-majoritarian, the Court should try to do it as rarely as possible. The passive virtues allow the Court to dodge cases where they would have to choose between law and democracy and imperil the Court's standing in society. As seen in the previous Part, the data suggest that Bickel may have been on to something. Judicial review—like question selection—is linked to greater politicization and divisiveness.

This Part turns from the empirics and considers the relationship between question selection and judicial review theoretically. Traditionally, appellate courts must answer a sufficient set of questions to justify their judgment and can only ignore a question if it could not affect the outcome. Courts had, however, some discretion over which sufficient set of questions it would answer. For instance, if there were multiple errors on the record, a court could pick which ones it wanted to focus on as grounds for reversal.[134] Yet this power had limits. For instance, the respondent had the right to defend the judgment on any other ground present in the record,[135] and doctrines like constitutional avoidance or a Justice's preference for or against judicial minimalism may direct the Court in one or another direction. Appellate courts have even less discretion when affirming since the appellate court must ensure the entire record is free of error to affirm.[136] An appellate court cannot simply assume that because the answer to one question was correct, all answers are correct.[137] Thus, while it is true that courts have always had some ability to choose questions on the margin, that power has traditionally been tethered to the obligation to decide cases, which often entailed answering more questions than the Court would prefer.[138]

This obligation to decide the case is at the core of the classic justification for judicial review that dates to at least *Marbury v. Madison*.[139] Chief Justice

133. *See* BICKEL, *supra* note 23, at 17.

134. It is true that appellate courts, when faced with multiple errors, could choose between them as the sufficient ground to reverse the judgment below. Nonetheless, there are constraints on even this ability. For instance, the canon of constitutional avoidance and judicial minimalism would seem to counsel avoiding some questions—likely the most interesting and consequential ones—if at all possible.

135. *See* Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982).

136. *See, e.g.*, Garland v. Davis, 45 U.S. 131, 143 (1846) ("[I]t is the duty of the court to give judgment on the whole record, and not merely on the points started by counsel.").

137. Again, if the Court could satisfy its duty to decide a case by answering any question of its choosing, there would have been no need for the Court to turn to Congress for expanded certiorari powers.

138. *See* Cohens v. Virginia, 19 U.S. 264, 404 (1821).

139. *See* John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 373 (1988) ("The power to interpret the Constitution . . . comes from the case-deciding power. To suggest that the power to interpret is primary and the case deciding power secondary, is

Marshall's answer to the question of where the Court gets the power to strike down a statute as unconstitutional is to plead necessity. The Court had to hear and decide the case—it had no choice—and deciding the case required exercising judicial review. Thus, judicial review is a consequence of the Court's unavoidable obligation to decide a case within its jurisdiction. Certiorari poses a problem for this account. As Professor Hartnett put the problem:

> A court that can simply refuse to hear a case can no longer credibly say that it had to decide it. If asked, "Why did you exercise the awesome power to declare an Act of Congress unconstitutional?" the Justices of the Supreme Court can no longer say, "Because we had to." Instead, they must say, "Because we chose to."[140]

Thus, the passive virtues were designed to protect and facilitate judicial review when durable principles were at stake, but those very virtues seem to undermine the Court's judicial review power.[141]

Bickel himself clearly recognized the problem.[142] His response to the "strict-constructionists" was two-fold. First, he asserted that the Court's business was expanding,[143] but there was no way to "get around the sheer necessity of limiting each year's business to what nine men can fruitfully deal with."[144] Second, he claimed that the alternative to selectively entering into politics was to risk "rampant activism that takes pride in not 'ducking' anything . . . ."[145] The problem with this second path was that it was unsustainable since such activism would undermine the Court's legitimacy and lead to efforts to restrict the Court's power.[146]

As others have noted, this answer is not directly responsive to the objection. The challenge posed was at the level of theory: where does the Court get judicial review powers if not from its obligation to decide cases? Bickel's answer: there is "a need for keeping the Court's constitutional interventions within bounds that are imposed . . . by the theory and practice of political

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to misinterpret the Constitution and to confuse cause and effect."); *see also* United States v. Raines, 362 U.S. 17, 20 (1960).

140. Hartnett, *supra* note 78, at 1717. Hartnett observes that, as of yet, there is no effective response to this critique.

141. *See* Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 580 ("Without the assumption that courts must decide cases within their jurisdiction, Marshall's argument would collapse; a court could avoid the dilemma described by Marshall simply by declining to decide the case at all.").

142. *See* BICKEL, *supra* note 23, at 127.

143. *Passive Virtues*, *supra* note 1, at 40. Interestingly, Bickel blamed this on birth rates rather than the Court's expansion of constitutional rights, which created new opportunities for litigation that would fall within the Court's mandatory jurisdiction. *See* Hartnett, *supra* note 78, at 1732.

144. BICKEL, *supra* note 23, at 128.

145. *Id.*

146. *Id.*

democracy."[147] This means a choice between limiting the number of times the Court would intervene in politics or limiting the scope of the Court's intervention.[148] Thus, for Bickel, the practical outweighs the theoretical.

There is a way for Bickel to answer the strict constructionists at the level of theory. To see it, rephrase the objection: if the Court no longer has an obligation, what then is the source of its judicial review power? A seemingly coherent response would be to simply deny the premise. There is nothing in the passive virtues that requires the Court to deny the obligation to decide all of the cases within its jurisdiction. Rather, Bickel simply notes that it is practically impossible for the Court to do this. The Court simply lacks the time and resources to fulfill all its obligations, but that does not mean it does not have those obligations in the first place.

Failure to fulfill a duty in one instance does not relieve obligation—and therefore remove the accompanying power—in another. Consider, for example, administrative agencies that may be tasked by Congress to establish regulations in some area.[149] Suppose Congress imposed a deadline of ninety days for some subset of these regulations, but the agency is unable to meet the deadline. It does not follow that the agency no longer has authority to establish other regulations simply because it failed to fulfill its obligations in the former instance.

Seen in this light, Bickel need not choose between the passive virtues and the theoretical legitimacy of judicial review. It could be that the Constitution and Congress have given the Court an obligation it cannot meet, and the Court simply exercises prudence in how it fulfills the obligation in some cases. The duty in those cases, though, would remain, and when the Court does grant certiorari and takes a case, it operates out of that obligation and so retains the power of judicial review.[150]

This argument can be seen relatively simply if one reframes the classic justification for judicial review as follows:

1. The Court has an obligation to decide the case.
2. Deciding the case requires the exercise of judicial review.
3. *Ought* implies *can*.

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147. *Id.*

148. *Id.*

149. Several scholars have linked the certiorari power to administrative law principles. *See, e.g.*, Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1 (2011).

150. Bickel does not pursue this possibility, and one may wonder why. The most likely explanation is that it would require permitting political prudence to supersede legal obligation. If Bickel allowed that, it would undermine the practical force of judicial review. When the Court determined that, for example, states had a legal obligation to desegregate schools, Bickel did not want the states to be able to reply, "Perhaps, but it's not possible, and it would be politically imprudent to try." Thus, the proposed theoretical solution merely reintroduces the practical problem, which Bickel was keen to avoid. Accordingly, Bickel simply never attempted to resolve the theoretical problem, and to my knowledge, nobody has ever done so convincingly.

4. It follows the Court has the power to exercise judicial review when it is deciding a case pursuant to its obligation to do so.

Now consider two cases, *A* and *B*, both subject to the Court's jurisdiction. Tradition asserts (at level one) that the Court has an obligation to decide both. The passive virtues reply that the Court has the power to avoid either both or neither. Suppose the Court denies certiorari in *A*. The traditionalist asserts that this denies the obligation to decide *B* as well. But notice that a passive virtues account did not deny this obligation. It did not even deny the obligation to decide *A*. Rather, it understands the Court to have a higher obligation, for instance, to its legitimacy or to judicial economy. Thus, the Court still has the necessary obligation to decide *B*, and step one is satisfied—despite the protestations of traditionalists.

Upon reflection, then, the traditional objection to the passive virtues in the context of judicial review proceeds too quickly. Perhaps Chief Justice Marshall was correct, and the Court does have an obligation to decide all cases within its jurisdiction. In exercising the passive virtues, the Court is ignoring its obligation to decide some cases. Yet, failure to satisfy one obligation does not necessarily eliminate another. It may be hypocrisy or "treason to the constitution"[151] in the context of the ignored case, but it does not excuse the Court from the obligation in other cases. Since the obligation remains, the judicial review power does too.

Things play out very differently when the Court focuses on questions instead of cases. To decide a case, an appellate court must answer all of the questions necessary to reach a judgment.[152] It then chooses other questions to answer until it has answered a sufficient set of questions to support its judgment. If the Court preemptively narrows its review to a subset of questions that make up less than a sufficient subset of questions to support judgment, it is not deciding the case. If it is not deciding the case, it does not need judicial review power.

Thus, in the context of question selection, the Court's discretion interrupts the argument at step two (deciding) rather than step one (obligation).[153] This argument is meaningfully different from earlier objections to the Court's power to avoid cases *in toto*. There, the objection ran that refusing obligation in *A* implies a loss of power in *B*. This is an argument that implies a type of transference between cases.

The argument is different when the Court limits review to questions. When the Court limits review in case *B* to a set of questions insufficient to decide the case, it is failing in its obligation to decide that case. Since it is not deciding the case, the Court no longer needs judicial review power to resolve it. The

151. *See* Cohens v. Virginia, 19 U.S. 264, 404 (1821).

152. For example, the court must answer whether it has subject-matter jurisdiction.

153. Hartnett gestures at this problem as well. *See* Hartnett, *supra* note 78, at 1717.

objection is internal and limited to *B*; it does not rest on the same implicit transference as the traditional objection.

To my knowledge, neither Bickel nor any subsequent writer has offered an alternative basis for judicial review. Rather, judicial review is justified on more functionalist grounds as a necessary tool for the Court to fulfill its more fundamental obligation of protecting minorities. That is, the normative justification for judicial review—it is just to strike a majoritarian statute because it violates some fundamental right—becomes the formal explanation as well.

Even if one is willing to accept this account, it would not explain why the Court needs the power of question selection. If rights are violated, those rights can be vindicated while deciding the entire case. If the Court wants to expand rights, those rights can be expanded in deciding the entire case. The sole exception to these possibilities would emerge when there is some other reason that the right-claiming party should lose the case other than the disputed question of right. In that instance, the Court can use question selection to skip over that issue and focus on the right itself.

However, in skipping the one question to reach the other and then rendering judgment, the Court reaches the wrong decision in the case according to law. Certainly, a party to a case in federal court has a right to a judgment consistent with law. Thus, using question selection to defend or advance durable principles or individual rights only "works" if it works an injustice to the parties in the case.

The analysis thus far suggests that question selection introduces a similar but stronger theoretical challenge to judicial review than the standard concern lodged against certiorari discretion and the passive virtues. The similarity of the concerns, however, suggests that Bickel would not rethink his response. The objection still operates at the level of theory, but Bickel is primarily interested in more practical issues. For Bickel, the fundamental problems—the sheer number of cases that could be within the Court's jurisdiction and the political costs of engagement—have not changed. The relevant question from the perspective of the passive virtues is whether question selection makes the work volume more manageable and helps the Court avoid politics.

B. Question Selection and the Median Voter Theorem

The Court has effectively abandoned the traditional judicial role of deciding full cases in favor of answering discrete questions. Quite often, the Court sets out to answer a single question in a given opinion. This turns out to have significant effects from a game theoretic perspective.

To see this, imagine a committee of three individuals. Let us call them Left, Center, and Right. Center stands at the midpoint between Left and Right on some ideological dimension. The committee votes according to majority rule,

and members prefer policies that are "closer" to themselves. Imagine how the game would go.

Suppose Left begins by proposing his ideal policy. Right responds by offering a different proposal that is not quite her preferred policy, as it is slightly shaded towards the center. As between these two, Center prefers the marginally more centrist proposal from Right. Left hates that proposal, so he counters by shifting a bit towards the middle. Right does the same, and the two repeat until they converge at Center's ideal policy.

The median voter theorem shows that this is not just a stylized example. When a committee votes by majority rule and members all have well-behaved preferences along a single dimension, the median always gets what it wants. On a nine-member Court, that means many 5–4 outcomes where the median wins.

Notice, however, that the median voter theorem requires all of the Justices to care about the same, single dimension. If there are multiple dimensions and Justices care about more than one of them, it becomes possible for Justices to bargain to different outcomes with different coalitions. When there is more than one issue in a case, the median voter theorem tends to break down. As the Court has exercised its power to target particular questions, it has simultaneously abandoned its ability to find a way around the median voter theorem. This then drives the tendency to more 5–4 outcomes.

The consequences of this likely go beyond the increased tendency to form narrow majorities. Consider Congress's incentives under this regime. To get anything passed in Congress, parties must work together, which is increasingly difficult in an era of intense polarization. In the past, one way to get things done was to logroll. That is, everybody gets something they want and gives up something they care about less. This is Congress operating on multiple dimensions. Congress can work out a deal that gives Republicans tax relief and Democrats more domestic infrastructure spending.

Suppose this entire bill comes before the Court. The Justices would have to consider both dimensions as well, and if they care about both dimensions, they could work a similar logroll on the Court to preserve the bill. Else, they would have to strike it down. However, if the Court only takes up one question at a time—for example some new environmental provision in the bill—the hard-won concessions gained by progressives would likely fall if the median Justice did not like them. The Court strikes the environmental protections, leaves the tax cuts, and the progressive legislator is left with nothing.

This example demonstrates a larger truth. When the Court targets single policy questions under a majority rule, it naturally drives policy to the center. For centrists, this is a fine thing. However, once more extreme legislators come to understand this phenomenon, it eliminates the possibility of compromise.

CONCLUSION

At a purely descriptive level, targeting questions appears to draw the Court deeper into politics: elites file more amicus briefs, and the Court itself is more divided. What is less clear is why this happens. Certainly, these effects make the Court appear more political, and there is reason to suspect the perception in these cases is accurate. By targeting questions, the Court behaves in a more political way than it does in other cases.

It is initially helpful to be clear as to what the claim is not. Politicization here is not motivated reasoning. There is no reason to think Justices reason differently when answering questions they select. Politicization is also not policymaking. Answering discrete questions certainly focuses the Court on particular policies at the expense of the larger legal case, but the Court answers questions in all of its cases. Indeed, by rule, it only answers questions.[154] It stopped deciding full cases long ago. The Court is not uniquely answering isolated questions in the cases where it chooses its questions. It is making policy in all of its cases.

Instead, what sets these cases apart is that within them, the Court is exercising an abnormal amount of control in selecting the policies it will make. Courts in the common law system frequently make policy, but they do so in cases they are forced to decide. Traditionally, it is the obligation to decide a case that gives courts the power to decide the questions.[155] The Court not only gets to choose its cases, but it also gets to choose which questions within those cases it will answer.

This makes the Court something of a legislature. While there has been no shortage of academics lamenting the Court's tendency to legislate, most critiques focus on the substance or the reasoning underlying the decision.[156] They do not focus on the agenda-setting power. But, as a general rule, it is legislatures, not courts, that have the power to set their own agendas.[157]

Of course, so described, this account would suggest that the Court is more political when it chooses questions than when it simply takes cases. The empirical results above are consistent with a slightly different framing. The claim is that when the Court exercises greater agenda-control, its decision-making process becomes more politicized.

This claim is purely relative: targeting questions makes the Court more politicized than it otherwise would be. The claim is not that if the Court

154. SUP. CT. R. 14.

155. *See* Marbury v. Madison, 5 U.S. 137, 174 (1803).

156. *E.g.*, ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012).

157. Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2355 n.163 (1999) (noting the "injunction that courts, unlike legislatures, should not set their own agenda"); *id.* at 2357 ("Unlike legislatures, [courts] do not set their own agenda as to when they issue rules governing what substantive issues.").

returned to deciding cases it would no longer be perceived as politicized. Nor is there any claim to exclusivity. Other things, beyond focusing on questions, can make the Court more political. For example, the Court has dramatically shrunk its docket over the last few decades. As the Court focuses its docket on the most politically salient cases, the Court is more likely to be seen as political. Further, the Court's flexible justiciability doctrine gives the Court freedom to engage or retreat from political engagement as it sees fit. There are many ways the Court can become politicized. Aggressive agenda setting appears to exacerbate the problems.

Bickel's passive virtues were aimed at protecting the Court from the dangers of politics. The idea was to keep the Court out of the line of fire. Yet it appears the Court uses the question selection component of certiorari to engage—rather than to disengage—with politics. There is minimal evidence of any meaningful correlation with the intrinsic importance of cases and the Court's decision to target questions. On the other hand, there is very strong evidence that when the Court does choose its question, it draws more amici and increases the chance of a 5–4 outcome. That is, choosing questions seems to make the Court both more political and more divided.

To be clear, the statistical evidence is suggestive and correlational. It is not definitive or causal. The evidence, however, does clearly reject the Shield and Neutral hypotheses. Instead, it is entirely consistent with the Sword hypothesis.

The implications of these results for the passive virtues are troubling. Bickel's response to the theoretical objections to the Court's agenda-control powers was to shift the ground of the engagement from theory to practice. Worry less about theory, Bickel urged, and focus on the political risks to the Court. Discretion lets the Court avoid politics, which preserves the institution from political dangers.

Missing from Bickel's account, however, is an important caveat and a dangerous alternative. Discretion allows the Court to avoid politics if it wants to. Alternatively, if the Court desires, it can use its agenda-control powers to engage in politics in ways that threaten its legitimacy. The evidence above suggests the Court, in the main, pursues this latter course.

At this point, it is important to be clear about what the data tells us and what it suggests. The statistical tests above convincingly show that when the Court narrows its review to questions it chooses directly, there are negative consequences.[158]

The empirical tests above suggest a broader lesson if we are willing to extrapolate beyond the data. The study above harnesses variation between the different ways the Court examines preselected questions. When it is more aggressive (limiting to a subset or adding its own question), the Court is more

158. Again, strictly speaking, this is a correlation that is consistent with a causal story, but it is not causally identified.

politicized than when it simply takes the questions presented by the parties. Might it be possible for the Court to be even less aggressive than simply granting the petition as written? Specifically, what if it considered the entire case and left open the possibility that contentious cases would be decided on technical grounds rather than by taking public stands on contentious issues? Might that dampen the negative effects further?

The Court's power to "pick which issues it [will] decide" makes the Court "function[] like a roving commission, or legislative body."[159] The ability to choose what policies it will target allows the Court to "shed the long-standing image of a neutral arbiter and an interpreter of policy" and emerge "as an active participant in making policy."[160] Notice there are two parts to this dynamic. First, the Court is choosing politicized questions. Second, this choice affects the Court's image. It is no longer viewed as a "neutral arbiter"; instead, it is perceived as a legislature. Thus, there is a shift in what the Court is, and there is subsequently a shift in the perception of the Court. Accordingly, targeting policies for review makes the Court appear more politicized because it does, in fact, make the Court more politicized.

This poses a problem for the Court, because the best social science evidence today suggests that the Court's biggest threat is public perception of the Court as a political body and the Justices as proverbial politicians in robes. Justices are never more like politicians in robes than when they choose what questions they want to address. The Court is never more like an ordinary political institution than when it selectively targets and reforms policies largely on its own initiative.

This suggests a need for reform. At a minimum, it should stop limiting questions or writing its own for the parties. A more ambitious reform proposal would be for the Court to abandon limited question review entirely and return to the classic appellate model of reviewing cases. Since the evidence suggests the Court is currently disproportionately focused on the most politically volatile questions in a case, pushing the Court to review the entire matter in controversy would allow the Court to decide cases on more technical and less politicized grounds.

The Court's extensive agenda-control powers have been justly criticized for generations, and defenders have again and again returned to the passive virtues to justify the Court's discretion. Yet the passive virtues, like all virtues, are developed by the choices we make. The Court is not making the kinds of choices that Bickel prescribed. Instead, the Court seems to use its discretion to pursue the active vices. This practice gives us the worst of both worlds. There

159. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 165 (8th ed. 2008).

160. PACELLE, JR., *supra* note 53, at 15; *see also* Hartnett, *supra* note 78, at 1718–26.

is no longer any theoretical justification for judicial review, and the Court is increasing the political threats it faces.